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No. _____

In The

Supreme Court of the United States

October Term, 1993

NELL D. AUTERY, as Administratrix of the Estate of ROY FRANKLIN AUTERY, deceased, and CHARLOTTE SCHREINER,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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89 pp

QUESTIONS PRESENTED

How specific must a statute, regulation or policy be to deprive the federal government of judgment or choice within the meaning of the discretionary function exception to the Federal Tort Claims Act?

Did the Eleventh Circuit misinterpret *Berkovitz*[1] and *Gaubert*[2] when it concluded that the Great Smoky Mountains National Park's tree hazard management policy was not sufficiently specific to impose a mandatory duty to remove hazardous trees even though the policy detailed *who* was to inspect the trees, *what* species of trees were to be inspected, *when* those inspections were to occur, *where* those inspections were to be made, and *how* those inspections were to be carried out?

Assuming, *arguendo*, the Eleventh Circuit correctly found that the Park Service's tree hazard management policy was not sufficiently specific to satisfy the first tier of the *Berkovitz/Gaubert* test, did the court correctly conclude that the failure to remove a known hazardous tree from a highly congested area of the park was the kind of judgment intended to be shielded by the discretionary function exception to the FTCA?

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[1] *Berkovitz v. United States*, 486 U.S. 531 (1988).

[2] *United States v. Gaubert*, 111 S.Ct. 1267 (1991).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Nell D. Autery, as administratrix of the estate of Roy Franklin Autery, deceased, and Charlotte Schreiner, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The United States District Court for the Southern District of Alabama rendered judgments in plaintiffs'

favor after a bench trial. *See, Autery v. United States*, 786 F.Supp. 944 (S.D. Ala. 1992); App. C at 22a-58a. The United States Court of Appeals for the Eleventh Circuit vacated the judgments, finding a lack of subject matter jurisdiction due to the discretionary function exception to the Federal Tort Claims Act. *See, Autery v. United States*, 992 F.2d 1523 (11th Cir. 1993); App. B at pp. 2a-21a. Petitioners' application for rehearing was denied by the Eleventh Circuit, without opinion, on July 28, 1993. App. A at p. 1a.

JURISDICTION

This lawsuit was brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-80. The United States District Courts have exclusive jurisdiction over such actions pursuant to 28 U.S.C. § 1346(b). The judgment appealed from was entered on June 11, 1993. App. B at 2a-21a. Petitioners' application for rehearing was denied on July 28, 1993. App. A at 1a. This petition for writ of certiorari is authorized by 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

28 U.S.C. § 2674 provides, in pertinent part:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . "

28 U.S.C. § 2680(a) provides, in pertinent part:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to –
>
> "(a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

STATEMENT OF THE CASE

(i) *Course of Proceedings Below*

On November 26, 1990, petitioners, Nell D. Autery, as the administratrix of the estate of Roy Franklin Autery, deceased, and Charlotte Schreiner, filed suit against the United States alleging negligence under the Federal Tort Claims Act. The cases were consolidated and a bench trial was held before Senior United States District Court Judge Virgil Pittman on January 30-31, 1992. On March 12, 1992, the district court rendered judgment in favor of Autery's estate for $500,000 and in favor of Schreiner for $20,477.30. App. C at 22a-58a. The United States appealed.

On June 11, 1993, the United States Court of Appeals for the Eleventh Circuit reversed, vacating the judgments and dismissing the suits on the ground that petitioners' claims were based on the government's failure to perform a discretionary function or duty under 28 U.S.C. § 2860(a). App. B at 2a-21a. On July 28, 1993, petitioners' application for rehearing was denied, without opinion. App. A at 1a.

(ii). *Statement of the Facts*

While travelling through the Great Smoky Mountains National Park ("GSMNP") over the Fourth of July holiday weekend in 1989, Roy Autery was decapitated and his fiancee, Charlotte Schreiner, injured when a fifty-year-old, seventy-foot, diseased black locust tree fell upon their passing automobile. The accident occurred only two hundred yards from the Oconaluftee Visitors' Center near a road sign that read: "35 Miles Per Hour, Congested Area." App. B at 4a; App. C at 28a. The tree was located on an embankment only forty-five feet from the highway. The tree, with visible external decay over 50% of its surface area, fell due to root rot. GSMNP is America's most heavily visited national park, receiving approximately 8.5 million visitors per year. App. C at 30a.

As found by the district court: "It [was] undisputed by the parties that a hazardous tree policy was in effect at GSMNP at the time of the accident". App. C at 45a. The GSMNP's hazardous tree policy derived from the National Park Service's mandate that "the saving and safeguarding of human life takes precedence over all other park management activities". App. C at 46a.

GSMNP's tree hazard management policy mandated the inspection for and removal of this tree before it fell. While the Park Service did not have a written tree hazard management plan ("THMP") until June, 1990, eleven months after the subject incident, the undisputed evidence established that the Park Service began work on what became its written THMP in May, 1984. App. C at 46a. During the six year interim, the written THMP went through numerous drafts and editing, but the policies and practices remained basically the same. Throughout

this drafting process, GSMNP's policy required *all* employees to report *all* known or potentially hazardous trees to area supervisory ranger or maintenance personnel for timely and appropriate action. App. C at 46a. As found by the district court, the final draft adopted in June, 1990 "evidenced GSMNP's *prior policy* and practice". App. C at 37a (emphasis in original). In other words, even though the written version of the THMP was not printed until after this incident, the tree hazard inspection and removal procedures contained in the written version were in effect at the time of the accident.

The park's maintenance personnel and rangers were responsible for tree inspections. App. E at 63a. The THMP specified certain areas of the park where tree inspections and removals were to be concentrated. These areas consisted of "any 'urbanized' areas of sustained visitor or employee use", such as visitor facilities, paved roads, campgrounds, parking lots, and heavily used trails. App. E at 63a. The area where the accident occurred was indisputedly an urbanized area of sustained visitor use.[3] App. C at 38a.

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[3] The district court found:

"The GSMNP is the most visited park in the United States with annual visitors of approximately 8.5 million people. Assuming that between 2.125 to 4.25 million of these people (1/4 to 1/2 of the 8.5 million annual visitors) travel past Oconaluftee Visitor Center within a year, the daily average of people passing the scene of this accident would be between 5,822 and 11,644." App. C at 38a.

In the urbanized areas of the park, the THMP required "on-foot", "walk-around" inspections "on at least an annual basis". The "regular inspection area" included "that area two times the average tree height in distance from areas of heavy visitor use." The THMP states, in part:

> "As has been discussed, tree hazard inspection and subsequent removal *will* take place in *all* areas of high visitor or employee use. Regular inspection of trees in areas of heavy visitor use within these zones *will* be accomplished on *at least* an annual basis. These areas include *all* campgrounds, visitor facilities, paved roads, parking lots, paved or heavily used interpretive trails, and 'urbanized' sections of boundary (See Appendix B). The regu r inspection area should include that area two times the average tree height in distance from areas of heavy visitor use. Areas of lighter visitor use, such as areas peripheral to those listed above, back country campsites, or lightly used trails, will be inspected at least every other year.
>
> "*All* regular inspections should be made on foot and *must* allow that any tree that could pose a hazard can be viewed from all sides, and that a thorough inspection of the crown can also be made. *'Windshield' inspections, while very useful as informal extra inspections, cannot be substituted for the thorough annual inspections detailed above.*"

App. E at 63a. In short, the THMP required more than simple "windshield" inspections as found by the Eleventh Circuit. In addition, the THMP required:

> "Inspection of heavily used areas *will* also be made during and immediately after periods of

> heavy snow, high winds, ice storms, or heavy rain to check for developments of new tree hazards and to close danger zones to the public."

App. E at 64a.

In addition, the THMP emphasized the removal of black locust trees like the one involved in this case. As found by the district court: "At the time of the accident made the basis of this suit, and for at least seven months before the accident, the defendant knew of the peculiar risks attendant to black locust trees in high density areas." App. C at 33a. The Park Service knew black locust trees were particularly hazardous due to their short lifespan and propensity for decay. The THMP, both before and after the written version was adopted, required the removal of all black locust trees in the park "when possible".[4] App. C at 47a; App. F at 66a.

Thus, GSMNP's THMP specified the "who, what, when, where, and how" with regard to inspection and removal of hazardous trees. The THMP specified: 1) *who* were to conduct such inspections (GSMNP's maintenance personnel and park rangers), 2) *what* species of trees were to be inspected and removed (particular species of trees, including black locust trees, in the park's "urbanized"

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[4] Dr. William H. Sites, a plant pathologist, wrote to the Supervisory Natural Resource Specialist at GSMNP eight months prior to this accident advising as follows:

> "Black locust trees are short-lived and due to decay (following borer activity), break up and drop limbs and tops. Avoid them in new area; *remove them when possible in existing areas.*"

See App. F at 67a (emphasis added).

"high-density" visitor use areas), 3) *when* such inspections were to occur (at least yearly, and more frequently after inclement weather), 4) *where* hazardous tree inspections were to take place ("in that area two times the average tree height in distance from areas of heavy visitor use"), and 5) *how* such inspections were to occur (on-foot, walk-around visual inspections). App. E & F at 62a-67a.

The Park Service regularly followed this policy and inspected for and removed hazardous trees *prior* to the incident involved in this case. In fact, the Park Service had cut down several other trees in the area *immediately adjacent to* the subject tree, but for some inexplicable reason, failed to detect and remove the subject tree. The subject tree had visible signs of external decay (half of its bark was missing) when it fell. As noted, the THMP required "all employees to report all 'known or potentially hazardous trees to area supervisory ranger or maintenance personnel for timely and appropriate action.' " App C. at 46a. GSMNP's employees admitted that had this tree been detected, it would have been removed.

REASONS FOR GRANTING THE PETITION

There are special and important reasons for granting this petition. First, pursuant to Supreme Court Rule 10.1(c), the Eleventh Circuit misinterpreted and misapplied this Court's decisions in *Berkovitz v. United States*, 486 U.S. 531 (1988) and *United States v Gaubert*, 111 S.Ct. 1267 (1991). By concluding that GSMNP's tree hazard management plan was not specific enough to impose a

mandatory duty on the Park Service to remove the subject tree, the Eleventh Circuit sharply deviated from the holdings of this Court as well as from numerous other federal courts of appeals' opinions involving far less stringent regulations or policies.

Second, assuming, *arguendo*, the Eleventh Circuit correctly found that the Park Service's tree hazard management plan was not sufficiently specific or mandatory to satisfy the first tier of the *Berkovitz/Gaubert* test, the court incorrectly concluded that the failure to remove the hazardous tree from a congested area of the Park – an act of omission – was the kind of "judgment" intended to be shielded by the discretionary function exception to the FTCA.

I.

Under this Court's holdings in *Berkovitz/Gaubert*, a court must first determine whether a government agency's conduct "violated a mandatory statute, regulation or policy that allowed for no judgment or choice." *United States v. Gaubert*, 111 S.Ct. 1267, 1273-74 (1991).

> "The discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect."

Berkovitz v. United States, 486 U.S. 531, 540-41 (1988) (citations omitted). "The requirement of judgment or choice is not satisfied if a 'federal statute, regulation or policy specifically prescribes a course of action for an employee to follow,' because the employee had no rightful option but to adhere to the directive." *Gaubert*, 111 S.Ct. at 1273 (quoting *Berkovitz*, 486 U.S. at 536).

The Eleventh Circuit's opinion correctly identifies these standards (App. B at 8a-9a), but misapplies them by finding GSMNP's policy not sufficiently mandatory or specific to remove the park's employees' discretion.

Despite the exacting specificity of the Park Service's tree hazard management plan, the Eleventh Circuit concluded that it did not "specifically prescribe a course of action . . . embodying a fixed or readily ascertainable standard." App. B at 15a. The Eleventh Circuit found: "Here, the inspection plan in effect at the time of the accident did not compel park employees to inspect certain trees on certain days or remove a particular number of trees per week." App. B at 17a. This conclusion imposes a much more stringent evidentiary burden on the plaintiff than this Court envisioned in *Gaubert* and *Berkovitz*. As noted, the written THMP defined *who* was to inspect, *what* was to be inspected, *when* these inspections were to occur, *where* inspections were to occur, and it defined *how* the inspections were to be physically done. App. E at 62a-64a.

While it is true that "GSMNP personnel *initially* conducted visual inspections from trucks driven along the road" (App. B at 15a-16a; App. C at 39a), an entirely

different and more stringent set of rules applied for "hazard" trees (like black locusts) located within the high-density "urbanized" areas of the park. Therefore, the Eleventh Circuit's opinion incorrectly concluded that "although the policy apparently singled out for special attention 'urbanized' areas like the one where the accident occurred, the policy prescribed neither a particular method of inspection nor special rules for inspecting black locust trees." App. B at 14a. The Eleventh Circuit incorrectly concluded that "officials at GSMNP chose to implement a plan of having park rangers and maintenance personnel first inspect trees from the roadway, and then, if in their *judgment*, the trees evidenced sufficient decay to demand a closer inspection, to take appropriate action." App. B at 15a-16a (emphasis in original).

As demonstrated, the park's policy mandated that on-foot, walk-around inspections be made of trees located in the exact proximity to roadways and urbanized areas as the subject tree. The accident occurred only two hundred yards from the Oconaluftee Visitors' Center near a road sign that read: "35 Miles Per Hour, Congested Area." App. B at 4a; App. C at 28a. Thus, the tree was located in a high-density, "urbanized" area. App. B. at 4a; App. C at 28a. The accident tree was approximately fifty years old, seventy feet in height, and was located forty-five feet up on an embankment leaning over the heavily traveled Newfound Gap Road. The "regular inspection area" mandated by the THMP was two times the distance

of average tree height from areas of heavy visitor use, which included the area involving the subject tree.[5]

In short, GSMNP's THMP left no room for judgment or choice regarding the detection and removal of the subject tree. The sight of a black locust tree within striking distance of a heavily used roadway *required* a walk-around inspection. In fact, the presence of *any* tree within striking distance of a congested roadway required inspection. Where is there any room for judgment or choice?

GSMNP's employees driving along the roadway were faced with a simple, mandatory obligation – to determine if there were any hazardous trees within a specified height/distance of the roadway. When such a tree was found, they were *required* to get out and do an on-foot, walk around inspection of all sides of the tree. The Park Service's employees admitted that if such an inspection had been done in this case, the subject tree would have been removed.

The Eleventh Circuit also incorrectly concluded that "there was no evidence presented in the district court that park personnel did not fully comply with the tree inspection procedure." App. B at 17a. In fact, park employees had been in the immediate vicinity of this accident tree cutting down other hazardous trees prior to the date of the accident. [R3-205; Plaintiffs' Ex. I at pp. 11

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[5] Although the "average tree height" is not disclosed by the record, it appears that "two times the average tree height" extends at least forty-five feet off the roadway. The subject tree was seventy feet in height. If it were of average height, the "regular inspection area" would extend 140 feet off the roadway on each side, more than three times the distance from the roadway as the subject tree.

and 43]. Thus, regardless of the Park Service's failure to detect the subject tree during a windshield or walk-around inspection, the evidence established that park employees had been in the immediate vicinity of the subject tree and still failed to detect it even though it had visible external signs of decay.

The Eleventh Circuit concluded that GSMNP's THMP was not sufficiently mandatory because "[it] did not compel park employees to inspect certain trees on certain days or remove a particular number of trees per week". App. B at 17a. This holding requires far more specificity than this Court envisioned when it decided *Gaubert* and *Berkovitz*. Other courts, following *Berkovitz* and *Gaubert*, have found no discretion in cases involving regulations and policies far less stringent than those involved in this case.[6]

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[6] E.g., *Kiehn v. United States*, 984 F.2d 1100, 1106 (10th Cir. 1993) (no discretion to not undertake emergency rescue when prescribed by Concession Permit's Operation Plan and Emergency Medical Services Guidelines); *Tinkler v. United States*, 982 F.2d 1456, 1464 (10th Cir. 1992) (no discretionary function immunity when Air Traffic Control Specialist fails to abide by Flight Service Manual's requirement to timely provide private pilot with accurate weather information); *Routh v. United States*, 941 F.2d 853, 855 (9th Cir. 1991) (contracting officer required to report absence of fall protection to contractor and give notice that corrective action needed under Federal Acquisition Regulations incorporated within construction contract); *See, also, McMichael v. United States*, 856 F.2d 1026, 1033 (8th Cir. 1988) (decided before *Gaubert*) (Government inspector's safety checklist required inspector to shut down munitions plant in event of an electrical storm; Government not immunized by the discretionary function exception for failing to order evacuation when electrical storm occurred); *Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986) (decided before *Gaubert*) (agency's failure to

Indeed, prior to the release of its opinion in this case, the Eleventh Circuit had properly followed *Berkovitz* and *Gaubert*.[7]

How can the Eleventh Circuit's opinion in this case be reconciled with *Berkovitz, Gaubert* or these other federal appellate opinions? The Eleventh Circuit should never have reached the second part of the *Berkovitz/ Gaubert* inquiry. GSMNP's THMP left no room for discretion. The THMP's requirements were mandatory and specific. The discretionary function exception was plainly not applicable to this case. This Court should grant this Petition to review this important issue.

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elevate power lines not protected by discretionary function immunity when agency's own safety policy expressly required it to "raise its power lines if they constitute[d] a safety hazard"); *Mandel v. United States*, 793 F.2d 964, 967 (8th Cir. 1986), (decided before *Gaubert*) (court refused to immunize the park service when its personnel failed to comply with its own adopted safety policy); *National Carriers, Inc. v. United States*, 755 F.2d 675, 678 (8th Cir. 1985), (court found no discretionary function protection for a meat inspector's failure to follow mandatory regulations).

[7] For example, in *Phillips v. United States*, 956 F.2d 1071, 1074-77 (11th Cir. 1992), the Eleventh Circuit concluded there was no discretion in the Army Corps of Engineers' implementation of its mandatory safety responsibilities. "The Government cannot expect Army Corps inspectors to make policy judgments concerning whether or not they should abide by the Corps' safety manual everyday they go to work". In *Dickerson, Inc. v. United States*, 875 F.2d 1577, 1581-82 (11th Cir. 1989), the court found no discretion where the Environmental Protection Agency's policies specifically prescribed a course of action for waste removal.

II.

Even if the conduct at issue involved an element of judgment, the Eleventh Circuit erred by concluding that that judgment "is of the kind the discretionary function exception was designed to shield." *Gaubert*, 111 S. Ct. at 1273. As the court recognizes in its opinion, there is no evidence to indicate the exercise of any judgment; the court simply found such judgment by "look[ing] to the nature of the challenged decision in an objective, or general sense, and ask[ing] whether that decision is one we would expect inherently to be grounded in considerations of policy." App. B at 20a. Based upon this test, the court found "the park service *likely* had to determine and weigh the risk of harm from trees in various locations, the need for other safety programs, the extent to which the natural state of the forest should be preserved, and the limited financial and human resources available". App. B at 21a. This is an erroneous finding given the facts in this case.

This case involves a *failure to act* and thus it is impossible to look to the nature of the "challenged decision" because the Park Service made no "decision" at all. The Park Service simply failed to identify the subject tree even though it had cut down other trees in its immediate vicinity. The Park Service never made a decision to not inspect this tree; it simply failed to do it.

This is not a case where the government had in fact identified the tree and then decided, on the basis of economic, social or political concerns, to not prioritize

and remove it. Instead, this is a case where the government simply failed to identify the tree. How can this omission be grounded in policy?

Even *if* the Park Service had some measure of judgment concerning the removal of the subject tree, or the removal of black locust trees generally, this is not the kind of judgment "the discretionary function exception was designed to shield."[8] Congress did not intend to shield from liability decisions which jeopardize human health, safety, and welfare, particularly when those decisions may affect the safety of millions of people per year.[9] GSMNP's hazardous tree policy derived from the National Park Service's mandate that "the saving and safeguarding of human life takes precedence over all other park management activities". App. C at 46a. The Park Service indisputably knew of the peculiar hazards associated with black locust trees, especially in high-density areas, well before the subject incident. Its failure to remove this particular tree, with clear signs of disease, from one of the busiest areas of the park is not the kind of judgment Congress sought to immunize with the discretionary function exception.

Although 28 U.S.C. § 2680(a) prohibits "judicial second guessing", that is exactly what the Eleventh Circuit did in this case. The government offered no proof that its failure to remove the subject tree was the result of any

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[8] The district court ruled: "If Congress intended a decision such as the one made the basis of this case to be shielded from liability, then the Federal Torts Claim Act would, for all practical purposes, be a nullity." App. C at 50a.

[9] See, footnote 3, *supra* at p. 5.

judgment, decision or choice.[10] Nevertheless, the court surmised that the Park Service's failure to remove it was "likely" grounded in policy. Since there was no evidence on this point, the court apparently concluded that while the park personnel were driving along the park's roadways, instead of inspecting for hazardous trees, they were balancing "economic, social, or political concerns".

The Eleventh Circuit cited *Gaubert* for the proposition that the decision "cautions against conducting 'a fact-based inquiry into the circumstances surrounding the government actor's exercise of a particular discretionary function' ". App. B at 20a. However, *Gaubert* nevertheless instructs that the "focus of the inquiry" remains "on the nature of the actions taken and on whether they are susceptible to policy analysis." Petitioners submit that, in a failure to act case, the burden must shift to the government to prove that its failure to act was, in fact, grounded in considerations of policy. How can the reviewing court "focus" on "the nature of *actions* taken" when the whole lawsuit centers around the fact that no actions were taken? Absent some proof concerning the "actions not taken", what conduct is the *reviewing court to determine was susceptible to some policy analysis*?

Petitioners submit that this Court should grant the instant petition to evaluate whether the Eleventh Circuit's

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[10] In fact, during trial, the Park Service was challenged to identify *any evidence* of a judgment or choice ever having been made by anyone. *No* decision, judgment or choice was ever identified. [E.g., RT-424].

application of the second tier of the *Gaubert* analysis is appropriate in a failure to act case such as this.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 92-6427

NELL D. AUTERY, As Administratrix of the Estate of Roy Franklin Autery; CHARLOTTE SCHREINER,

Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION FOR REHEARING

(Filed July 28, 1993)

BEFORE: TJOFLAT, Chief Judge, KRAVITCH, Circuit Judge, and RONEY, Senior Circuit Judge,

PER CURIAM:

The petition for rehearing filed by appellees NELL D. AUTERY and CHARLOTTE SCHREINER is denied.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

APPENDIX B

Nell D. AUTERY, As Administratrix of the Estate of Roy Franklin Autery; Charlotte Schreiner, Plaintiffs-Appellees,

v.

UNITED STATES of America, Defendant-Appellant.

No. 92-6427.

United States Court of Appeals, Eleventh Circuit.

June 11, 1993.

Appeal from the United States District Court for the Southern District of Alabama.

Before TJOFLAT, Chief Judge, KRAVITCH, Circuit Judge, and RONEY, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

Roy Franklin Autery was killed and Charlotte Schreiner was injured when a black locust tree fell on their car as they drove through Great Smokey Mountain National Park. Nell Autery, as administratrix of her brother's estate, and Schreiner (together, "the plaintiffs") brought this negligence action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 ("FTCA"). After a bench trial, the district court entered a judgment for the plaintiffs, holding that the United States had negligently failed to (1) devise, implement and follow an appropriate tree hazard management plan; (2) properly maintain the National Park area; (3) properly inspect the trees in the National Park in the area where the accident occurred; and (4) identify and remove the

hazardous trees which fell and struck Autery and Schreiner.[1] The court awarded $500,000 in compensatory damages to Autery's estate and $20,000 to Schreiner for negligent infliction of emotional distress, 786 F.Supp. 944.

At issue in this case is whether the alleged negligent conduct by the United States falls within the ambit of the discretionary function exception of the FTCA, 28 U.S.C. § 2680(a). Because we hold that it does, we REVERSE the judgment of the district court and DISMISS the case for lack of subject matter jurisdiction.[2]

I.

The district court made findings of fact summarized as follows. Autery and Schreiner were driving on U.S. Highway 441 in Great Smokey Mountain National Park ("GSMNP") on July 5, 1989 when two locust trees fell into the roadway. GSMNP is owned and operated by the United States. Autery, who was driving, was killed instantly when the one of the trees struck the car. Schreiner was injured. The tree in question was approximately

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[1] The court dismissed plaintiffs' claim that the government had acted willfully and wantonly with respect to tree inspection and removal.

[2] The government challenged the district court's judgment for plaintiffs on two grounds: (1) that the government's conduct at issue in this case was protected by the discretionary function exception; and (2) that under North Carolina law, the government did not owe a duty of reasonable care to the plaintiffs. Because the issue under the FTCA is one of federal court jurisdiction, we address it first. Holding that federal jurisdiction does not exist, we do not reach the merits of the challenge under North Carolina law.

50 years old, approximately 70 feet in height and fell due to root rot. The accident occurred near the Oconaluftee Visitor's Center; a road sign in the area read, "35 Miles Per Hour, Congested Area." At the time of the accident, GSMNP did not have in force a written tree hazard management plan. In October 1976, the National Park Service ("Park Service" or "NPS") had issued Special Directive 76-9 (Health and Safety of Park Visitors) which stated in part:

> Protection of the visitor, and park and concessioner employees, from violations of laws and regulations and from hazards inherent in the park environment, is a prime responsibility of the National Park Service. *The saving and safeguarding of human life takes precedence over all other park management activities,* whether the life is of the visitor, concessioner, or park employee . . . .

R. 2-64 at 11-12 (emphasis added by district court). Pursuant to this directive, the unwritten policy at GSMNP at the time of the accident was to

> make every reasonable effort within the constraints of budget, manpower, and equipment available to detect, document, remove, and prevent tree hazards. . . . *Id.* at 12.[3]

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[3] The district court found that this policy was formalized in a written Tree Hazard Management Plan issued in June 1990, ten months after the date of the accident. The written policy stated in part that

> [t]he areas of the park in which the NPS will inspect and remove tree hazards are any "urbanized" areas of sustained visitor or employee use.

R. 2-64 at 17. Based on plaintiffs' and defendant's witness testimony, the trial court determined that "because of the proximity

In order to effectuate this policy, GSMNP personnel initially conducted visual inspections from trucks driven along the road. Any tree that appeared hazardous was then inspected more closely. "[I]t was the established practice at the park for all employees to identify and report known or potentially known hazardous trees to supervisors or maintenance personnel for appropriate action." *Id.* at 10-11.

The district court also found that prior to the accident, GSMNP personnel received information regarding the risks to black locust trees in high-density areas. Keith Langdon, Supervisory Natural Resource Specialist at GSMNP, received a letter in November 1988 from Dr. William Sites, a plant pathologist, which contained the following "critical safety information":

> *Black locust trees* are short-lived and due to decay (following borer activity), break up and drop limbs and tops. Avoid them in new areas; *remove* them *when possible* in existing areas.

Id. at 12 (emphasis added by district court). Langdon circulated this letter to Tim Stubbs, the primary preparer of the written tree hazard management plan, and met with GSMNP rangers and maintenance personnel to discuss the potential dangers posed by black locust trees.[4]

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of the accident to the Oconaluftee Visitor Center, the accident happened in a location prone to heavy, sustained use by visitors in the park." *Id.* at 18.

[4] This information also was passed along to Dean Berg, Langdon's supervisor; Joe Abrell, Langdon's division chief; Louis Smith, head of tree maintenance for the North Carolina side of the park; Frank Hyatt, facility manager responsible for

Based on this evidence, the district court determined that park personnel "had or should have had . . . knowledge . . . of the black locust tree danger . . . , [and that no] actions were taken with regard to reducing the hazards identified with the black locust trees." *Id.* at 14. The court further concluded that this inaction – the failure of park personnel to implement a closer inspection of tree hazards – "was a failure by the defendant to use due care in the safeguarding of human life by the removal of black locust tree hazards." *Id.* at 15.[5]

II.

A.

The FTCA waives the sovereign immunity of the United States for claims brought against it

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or

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maintenance on the North Carolina side of the park; Robert Hockman, facility manager responsible for maintenance on the Tennessee side of the park; Don Stevenson, a maintenance foreman on the Tennessee side of the park; James Patty, a maintenance worker on the Tennessee side of the park; and Buford Price, park personnel.

[5] As discussed more fully in Part II.A.1., *infra*, the district court erroneously concluded that its findings with respect to the government's alleged negligence were relevant to determining whether the government's conduct falls within the scope of the discretionary function exception of the FTCA. We include these findings in this opinion to highlight the district court's reasoning.

> employment, under circumstances where the United States, of a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). Jurisdiction over FTCA claims is vested exclusively in the federal courts. *Id.* This waiver of immunity, however, is qualified by several exceptions. *See* 28 U.S.C. § 2680. At issue here is the "discretionary function" exception, which precludes government liability for

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

The discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808, 104 S.Ct. 2755, 2762, 81 L.Ed.2d 660 (1984). Separation of powers principles further support Congress' decision to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 814, 104 S.Ct. at 2765.

The Supreme Court recently has clarified the two-part test for determining whether the government's conduct falls within the scope of the discretionary function exception.[6] We must first determine whether the

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[6] This court has not dealt explicitly with the question of whether the plaintiff or the government has the burden of proving the applicability of the discretionary function exception. All circuits to address the issue have concluded that "plaintiff bears the burden of persuading the court that it has subject matter jurisdiction under the FTCA's general waiver of immunity," but "the burden of proving the [discretionary function] exception lies with the government." *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992);*see also Carlyle v. United States*, 674 F.2d 554, 556 (6th Cir.1982); *Stewart v. United States*, 199 F.2d 517, 520 (7th Cir.1952). "Only after a plaintiff has successfully invoked jurisdiction by a pleading that facially alleges matters not excepted by § 2680 does the burden fall on the government to prove the applicability of a specific provision of § 2680." *Carlyle*, 674 F.2d at 556 (*quoted in Prescott*, 973 F.2d at 702 n. 4).

In *United States v. Gaubert*, ___ U.S. ___, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991), the Supreme Court appeared to impose the burden on the tort plaintiff to show that the government's conduct is not protected under the discretionary function exception. "For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of a regulatory regime." *Id.* at ___-___, 111 S.Ct. at 1274-75. The Ninth Circuit, in *Prescott*, held that *Gaubert* does not conflict with its ruling because *Gaubert* requires plaintiffs only to allege facts sufficient to state a claim under the FTCA, but does not deal specifically with the burden of proof issue. *Prescott*, 973 F.2d at 702 n. 4. The Tenth Circuit has questioned the approach taken in *Prescott*, but has not made a formal ruling on the issue. *Kiehn v. United States*, 984 F.2d 1100, 1105 n. 7 (10th Cir.1993).

These issues were not presented on appeal in this case. As this is an issue of first impression in this circuit, we decline to make an explicit holding without the benefit of briefing from

challenged act or omission violated a mandatory regulation or policy that allowed no judgment or choice. *United States v. Gaubert*, ___ U.S. ___, ___-___, 111 S.Ct. 1267, 1273-74, 113 L.Ed.2d 335 (1991). "The requirement of judgment or choice is not satisfied if a 'federal statute, regulation or policy specifically prescribes a course of action for an employee to follow,' because 'the employee had no rightful option but to adhere to the directive.' " *Id.* at ___, 111 S.Ct. at 1273 (quoting *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 1958, 100 L.Ed.2d 531 (1988)).

" '[E]ven assuming the challenged conduct involves an element of judgment,' " however, we then must determine if the challenged actions are the kind of conduct " 'that the discretionary function exception was designed to shield.' " *Id.* (quoting *Berkovitz*, 486 U.S. at 536, 108 S.Ct. at 1958); *see also Phillips v. United States*, 956 F.2d 1071, 1075 (11th Cir.1992). The conduct must be "grounded in the policy of the regulatory regime." *Gaubert, supra*, ___ U.S. at ___, 111 S.Ct. at 1275. In *Gaubert*, the Court discussed the type of conduct that would be considered grounded in judgment or choice but not in developing or carrying out public policy.

> [If a governmental official] drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the

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the parties. Nevertheless, even under the more stringent *Prescott* approach, we hold that the government proved that the discretionary function exception applies to its conduct in this case.

> official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.

Id. at ___ n. 7, 111 S.Ct. at 1275 n. 7.

B.

1.

Before we address whether the government's conduct violated a mandatory regulation or policy, we must determine exactly what conduct is at issue. The government argues that the conduct to be evaluated is "the Park Service's decision to establish and implement a tree inspection program. . . . " Gov't. Br. at 9. Plaintiffs, on the other hand, contend that "the conduct at issue [is] the park's failure to carry out the mandates of its then existing policy of identifying and eliminating known hazardous trees." Pls. Br. at 24-25. Plaintiffs apparently concede that the discretionary function exception applies "to the park's decision to adopt a . . . tree hazard plan," but argue that "[t]he doctrine does not apply to the manner in which the park's employees carried out the plan." Pls. Br. at 27. The district court, in adopting the report and recommendations of the federal magistrate, held that "the inquiry . . . is whether the Park Service officials had discretion under their Tree Hazard Management Plan to remove 'hazardous' trees. . . . " R. 2-64 at 26.

The government's focus on the decision to establish a tree inspection plan is too broad; as plaintiffs concede, the government had the discretion to adopt or not adopt a plan at all. The more important question is whether any

statute, regulation or agency guideline specifically provided that *if* a tree inspection plan were developed, it would have to include particular inspection procedures.[7]

Plaintiffs' and the district court's focus, on the other hand, is too narrow. The particular inquiries posed by plaintiffs and the district court are based on misinterpretations of the law. Plaintiffs' support their contention that the discretionary function exception does not apply to the manner in which park personnel administered the inspection plan by relying on Fifth Circuit cases that had held that the government was not protected when "it was performing an operational function." *Denham v. United States,* 834 F.2d 518, 521 (5th Cir.1987); *See also Wysinger v. United States,* 784 F.2d 1252, 1253 (5th Cir.1986); *Butler v. United States,* 726 F.2d 1057, 1062-63 (5th Cir.1984). The Supreme Court squarely rejected this proposed distinction in *Gaubert,* ruling that the Fifth Circuit "erred in holding that the [discretionary function]

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[7] This distinction is important. As the Supreme Court has said many times – in a different context – the nature of the federal regulatory regime is generally permissive but those who choose to participate must abide by the rules and regulations mandated by Congress. Thus, those who seek federal financial assistance, whether it be states, non-profit organizations or individuals, have a choice whether to participate in a federal program. But once that decision to participate is made, the grant recipient is bound by any mandatory rules imposed by federal law. *See, e.g., South Dakota v. Dole,* 483 U.S. 203, 206-07, 107 S.Ct. 2793, 2796, 97 L.Ed.2d 171 (1987) (holding that federal statute conditioning receipt of highway funds on adoption of minimum drinking age is valid use of Congress' spending power) (and cases cited therein).

exception does not reach decisions made at the operational or management level." *Gaubert*, ___ U.S. at ___, 111 S.Ct. at 1275.[8] "Discretionary conduct is not confined to the policy or planning level." *Id.; see also Varig Airlines*, 467 U.S. at 813, 104 S.Ct. at 2764 ("[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.").

The district court's inquiry, on the other hand, by asking whether the park officials had discretion to remove "hazardous" trees, begs the question. The tree inspection program was designed to identify which trees were hazardous. Whether park personnel had discretion in executing that plan is the relevant issue. The district court's analysis appears to collapse the question of whether the park service was negligent into the discretionary function inquiry. That is, after finding that the Park Service had knowledge of the danger of black locust trees, the district court imposed a "reasonableness" requirement on the government's conduct.[9]

It is the governing administrative policy, not the Park Services's knowledge of danger, however, that determines whether certain conduct is mandatory for purposes

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[8] The Court went on to say that the court of appeals had misinterpreted previous cases as "perpetuating a nonexistent dichotomy between discretionary functions and operational activities." *Gaubert*, ___ U.S. at ___, 111 S.Ct. at 1275.

[9] The court wrote that once park officials received the information regarding black locusts, "no reasonable range of choices existed with respect to the Park Service['s] inaction." R. 2-64 at 30.

of the discretionary function exception. The FTCA expressly provides that the exception "applies to policy judgments, even to those constituting abuse of discretion. . . . " *Dickerson Inc. v. United States,* 875 F.2d 1577, 1581 (11th Cir.1989); *see also Dalehite v. United States,* 346 U.S. 15, 33, 73 S.Ct. 956, 967, 97 L.Ed. 1427 (1953) ("The exercise of discretion could not be abused without negligence or a wrongful act."); *Layton v. United States,* 984 F.2d 1496, 1502 (8th Cir.1993) ("Whether . . . employees were negligent in making any . . . decisions is irrelevant."); *Kennewick Irr. Dist. v. United States,* 880 F.2d 1018, 1029 (9th Cir.1989) ("[N]egligence is simply irrelevant to the discretionary function inquiry."); *Reeves v. United States Dept. of Treasury,* 809 F.Supp. 92, 94 (N.D.Ga. 1992) (same).

Therefore, the relevant inquiry here is whether controlling statutes, regulations and administrative policies mandated that the Park Service inspect for hazardous trees in a specific manner. If not, then the Park officials' decision to employ a particular inspection procedure – and its execution of that plan – is protected by the discretionary function exception.

2.

Title 16 of the United States Code, section 1 creates the National Park Service and places it under the charge of a director appointed by the Secretary of the Interior. The statute gives the Secretary broad authority to "promote and regulate" the national parks, so as "to conserve the scenery and the natural and historic objects and the wild life . . . and to provide for the enjoyment of the

same. . . . " 16 U.S.C. § 1. Section 3 authorizes the Secretary to provide "in his discretion for the destruction . . . of . . . plant life as may be detrimental to the use of [the national] parks." 16 U.S.C. § 3. Pursuant to these statutory grants of authority, the Park Service, under the direction of the Secretary, had discretion to design and implement a policy for evaluating and removing trees from GSMNP. *See Zumwalt v. United States*, 928 F.2d 951, 954-55 (10th Cir.1991) (finding discretion when Park Service policy provided only general guidelines for how to determine hazardous sections of trails). The remaining issue in this inquiry, therefore, is whether some other Park Service policy or directive removed that discretion by mandating a method of tree management different than the one the Park Service chose to adopt.

As the district court found, Special Directive 76-9 formed the basis of the unwritten tree inspection plan in effect at the time of the accident. The Directive, written in broad language, provided that the "saving and safeguarding of human life takes precedence over all other park management activities. . . . " R. 2-64 at 11 (emphasis of district court omitted). The Directive does not mention tree inspections, nor how the agency should implement the goal of safety or balance it against other considerations. The unwritten policy required only that employees "make every effort within the constraints of budget, manpower, and equipment available to recognize and report" hazardous trees. *Id.* Although the policy apparently singled out for special attention "urbanized" areas like the one where the accident occurred, the policy prescribed neither a particular method of inspection nor special rules for inspecting black locust trees.

Such a general guideline is insufficient to deprive the federal government of the protection of the discretionary function exception. Only if a "federal statute, regulation, or policy specifically prescribes a course of action," *Berkovitz*, 486 U.S. at 536, 108 S.Ct. at 1958, embodying a *"fixed or readily ascertainable standard,"* will a government employee's conduct not fall within the discretionary function exception. *Alabama Elec. Co-op v. United States*, 769 F.2d 1523, 1529 (11th Cir.1985) (quoting *Miller v. United States*, 710 F.2d 656, 663 (10th Cir.), *cert. denied*, 464 U.S. 939, 104 S.Ct. 352, 78 L.Ed.2d 316 (1983) (emphasis in original) (other citations omitted)).

The district court erred when it concluded:

> [I]t cannot be contended that the park officials had discretion to decide whether overriding policy considerations of protecting the trees and the natural state of the area outweighed the safety of humans using the park roadway.

R. 2-64 at 30. Neither federal statutes nor Park Service policy, as embodied in the Special Directive, require safety at any cost. To be sure, the Directive specifies that safety is the most important consideration. Nevertheless, the statutes and Park Service policy ultimately involve striking a balance between providing for safety and fulfilling the Park Service's charge to protect the natural environment, while taking personnel and budgetary limitations into account. Based on these competing considerations, officials at GSMNP chose to implement a plan of having park rangers and maintenance personnel first inspect trees from the roadway, and then, if in their

judgment, the trees evidenced sufficient decay to demand a closer inspection, to take appropriate action.[10]

Plaintiffs cite this court's recent decision in *Phillips*, 956 F.2d 1071, to support their argument that once the tree inspection procedure was implemented, performance of it became mandatory. In *Phillips*, an employee for an independent contractor was injured when he fell from scaffolding at a construction site at Robins Air Force Base in Georgia. Insuring the safety of the scaffolding was the responsibility of the resident engineer, the quality assurance representative and the chief of quality assurance, all of whom were Army Corps employees. An accident prevention plan and a safety manual, both written by the Army Corps, prescribed specific safety procedures these three employees were to carry out every day. The court,

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[10] This is similar to *Zumwalt*, where the court held that under National Park Service policies, park personnel retained discretion to implement a plan to make hiking trails more safe for visitors. The court wrote:

> To implement the Project Statement, Park Service personnel must first determine which sections of the Trail have proven to be hazardous or difficult to follow. The Project Statement does not provide any direction on how this determination should be made. Once a hazardous section is identified, Park Service personnel must determine what type of improvements should be located based on wilderness policy and the need for public safety. Further, the Project Statement contains no time frame for implementing the recommended action. These factors demonstrate the need for individual judgment by Park Service employees.

Zumwalt, 928 F.2d at 954.

in holding for the plaintiff, reasoned that "the government cannot expect Army Corps inspectors to make policy judgments concerning whether or not they should abide by the directives in the Corps's Safety Manual every day they go to work." 956 F.2d at 1075.

Whether a policy establishes a mandatory requirement so as to deprive government employees of discretion depends on the terms of the particular policy at issue. *See, e.g., Industria Panificadora v. United States,* 957 F.2d 886, 887 (D.C.Cir.) (provision requiring government to "take all measures" to "restore, and ensure . . . public order and safety" does not prescribe a specific course of action), *cert. denied,* ___ U.S. ___, 113 S.Ct. 304, 121 L.Ed.2d 227 (1992). Here, the inspection plan in effect at the time of the accident did not compel park employees to inspect certain trees on certain days or remove a particular number of trees per week.[11]

Finally, there was no evidence presented in the district court that park personnel did not fully comply with the tree inspection procedure. "Government liability cannot logically be predicated on the failure of [employees] to go beyond what the operational plans . . . required them to do." *Allen v. United States,* 816 F.2d 1417, 1421

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[11] The fact that park officials had information regarding the potential danger of black locust trees did not remove their discretion to plan and implement the tree inspection plan. To be sure, the Park Service's awareness that the black locust trees were especially likely to decay is relevant to whether it was negligent in failing to discover and remove the tree that caused the accident. But negligence is irrelevant to the mandatory-policy inquiry.

(10th Cir.1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 694, 98 L.Ed.2d 647 (1988).

C.

Having decided that no mandatory statute, regulation or policy controlled the development and implementation of GSMNP's unwritten tree inspection plan, we now address whether the choices involved in such a development and implementation are grounded in social, economic and public policy. Generally, courts have held that decisions about what safety measures to employ in national parks and how to execute them involve balancing the same considerations that inform all policy decisions regarding the management of national parks: safety, aesthetics, environmental impact, and available financial resources. *See, e.g., Kiehn v. United States*, 984 F.2d 1100, 1105 (10th Cir.1993) (holding that decisions about whether and where to post warning signs in remote areas of park involve balancing "resource allocation, visitor safety and scenic preservation"); *Johnson v. United States*, 949 F.2d 332, 338 (10th Cir.1991); *Bowman v. United States*, 820 F.2d 1393, 1395 (4th Cir.1987); *see also* 16 U.S.C. §§ 1, 3. As the *Zumwalt* court held, when the Park Service balances safety considerations against the interest in preserving the natural environment, that decision is grounded in policy. 928 F.2d at 955.

Not all decisions regarding safety management have been found to be grounded in social, economic and political policies. In *ARA Leisure Services v. United States*, 831 F.2d 193 (9th Cir.1987), the court held that the discretionary function exception did not apply to the Park Service's

failure to perform ordinary maintenance to keep a road in safe condition. The mere fact that Park Service personnel were required to work within a budget was irrelevant, the court said, because "[b]udgetary constraints underlie virtually all governmental activity." 831 F.2d at 196. Implicit in the court's reasoning in *ARA Leisure*, however, was that the decision not to repair the road erosion was not discretionary because there was "evidence in the record that Park Service standards explicitly required that park roads 'conform to the original grades and alignments' and that graded roads be 'firm [and] uniform cross section.' " 831 F.2d at 195 (citing Park Service policy). "Thus, the Park Service's actions in that case failed the first element of the *Berkovitz-Gaubert* analysis: there existed mandatory regulations compelling the Park Service to act, and those regulations were not met." *Baum v. United States*, 986 F.2d 716, 724 (4th Cir.1993) (discussing *ARA Leisure*).[12]

In *Summers v. United States*, 905 F.2d 1212 (9th Cir.1990), decided after *Berkovitz*, the court affirmed the reasoning in *ARA Leisure Services* and declined to apply the discretionary function exception to the Park Service's failure to warn of the potential danger of stepping on hot coals. In so doing, the court also relied on its previous decision in *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018 (9th Cir.1989), in which it held that FTCA liability attached to the government's conduct "because there was no evidence of policy judgment in the government's negligent failure to remove certain unsuitable materials during construction of the canal." *Summers*, 905 F.2d at 1216

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[12] *ARA Leisure* was decided before the Supreme Court ruled in *Berkovitz*.

(discussing *Kennewick*). *Gaubert*, however, cautions against conducting "a fact-based inquiry into the circumstances surrounding the government actor's exercise of a particular discretionary function," urging courts instead to "look to the nature of the challenged decision in an objective, or general sense, and ask whether that decision is one we would expect inherently to be grounded in considerations of policy." *Baum*, 986 F.2d at 720-21.

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be *presumed* that the agent's acts are grounded in policy when exercising that discretion. . . . The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

Gaubert, ___ U.S. at ___-___, 111 S.Ct. at 1274-75 (emphasis added). *See also In re Joint Eastern & Southern Districts Asbestos Litigation*, 891 F.2d 31, 37 (2d Cir.1989) ("[I]t is unimportant whether the government actually balanced economic, social, and political concerns in reaching its decision."); *United States Fidelity & Guar. Co. v. United States*, 837 F.2d 116, 120-21 (3d Cir.), *cert. denied*, 487 U.S. 1235, 108 S.Ct. 2902, 101 L.Ed.2d 935 (1988).[13]

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[13] The district court's ruling suggests that it conducted a subjective, fact-based inquiry as to whether the decisions involved balancing social, economic or political concerns. The court wrote that "there is no indication" that the government's actions were in fact [a]ffected by "constraints of personpower and budget." R. 2-64 at 14.

To decide on a method of inspecting potentially hazardous trees, and in carrying out the plan, the Park Service likely had to determine and weigh the risk of harm from trees in various locations, the need for other safety programs, the extent to which the natural state of the forest should be preserved, and the limited financial and human resources available. Indeed, the district court recognized this when it criticized the Park Service for elevating "the overriding policy considerations of protecting the trees and the natural state of the area" over "the safety of humans using the park roadway." R. 2-64 at 30. Although the district court may have disagreed with the balance struck by the Park Service, or believed that some other policy would have been better, the discretionary function exception is designed to protect against just this type of "judicial 'second-guessing.' " *Varig Airlines*, 467 U.S. at 814, 104 S.Ct. at 2765; *see also Bowman*, 820 F.2d at 1395.

III.

For the foregoing reasons, we hold that the decisions made by GSMNP personnel in designing and implementing its unwritten tree inspection program fall within the ambit of the discretionary function exception. Thus, both this court and the district court lack jurisdiction over plaintiffs' claim. Accordingly, we REVERSE the decision of the district court, VACATE the judgment and DISMISS the case for lack of subject matter jurisdiction.

APPENDIX C

Nell D. AUTERY, as Administratrix of the Estate of Roy Franklin Autery, deceased, Plaintiff,

v.

UNITED STATES of America, Defendant.

Charlotte SCHREINER, Plaintiff,

v.

UNITED STATES of America, Defendant.

Civ. A. No. 90-0884-P-S.

United States District Court, S.D. Alabama, S.D.

March 12, 1992.

Joseph M. Brown, Jr., David G. Wirtes, Jr., Cunningham, Bounds, Yance, Crowder & Brown, Mobile, Ala., for plaintiff.

William R. Sawyer, Asst. U.S. Atty., Mobile, Ala., for defendant.

OPINION AND ORDER

PITTMAN, Senior District Judge.

This matter was heard by the court sitting without a jury on January 30-31, 1992. The parties announced ready for trial, opening statements were made, evidence was presented, and closing arguments were made.

This case involves an accident that occurred in a national park and arises under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 [hereinafter "FTCA"]. Roy Franklin Autery was killed in the accident, and Charlotte Schreiner – a passenger in Mr. Autery's car at the time of the accident – was injured in the accident.

Following the accident, proper and timely administrative claims were filed on behalf of both Autery and Schreiner, as is required by 28 U.S.C. § 2675(a). Autery's administrative tort claim was for $500,000.00, and Schreiner's was for $50,000.00. Plaintiffs' exhs. P, O. Both claims were denied. *Id.*

A claimant under the Federal Tort Claims Act is ordinarily restricted in the amount he or she may recover upon a finding of governmental liability to the amount specified in the administrative claim, "except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim." 28 U.S.C. § 2675(b).

On November 26, 1990, Mr. Autery's estate filed suit against the United States, claiming that negligence on the part of the United States caused Mr. Autery's death. Doc. 1. On that same day, Ms. Schreiner filed a separate suit against the United States, claiming that negligence on the part of the United States caused her injuries. Doc. 1A. The cases were consolidated on March 4, 1991. Docs. 12 & 12A.

On December 5, 1991, the plaintiffs filed second amended complaints, which added a claim that the death

and injuries were caused by wantonness on the part of the United States. Docs. 37-38. These claims originally sought punitive damages, but plaintiffs' counsel later dropped the punitive damage claims. *See* Doc. 59 at 3 n. 1.

The basic facts concerning the accident in this case are not disputed. The accident occurred on July 5, 1989, in the Great Smoky Mountain National Park ["GSMNP"] on U.S. Highway 441, which is maintained and operated by the United States. Ray Franklin Autery was driving his 1989 Camaro south on U.S. Highway 441, also known as the Newfound Gap Road, in a part of GSMNP that is in the state of North Carolina. Ms. Schreiner was a passenger in the car, and the vacationing couple was approximately two hundred yards from the Oconaluftee Visitor's Center when a twin trunked black locust tree fell into the roadway. One trunk of the tree – the root of which was located approximately forty-five feet up the west bank of the road – struck Mr. Autery's car, instantly killing him and injuring Ms. Schreiner.

Plaintiffs contend that the United States was negligent in one or more of the following ways:

> i. Negligently failing to properly maintain the National Park area where the accident occurred by failing to identify and remove the hazardous trees.
>
> ii. Negligently failing to properly inspect the trees in the National Park along the area where this accident occurred. . . .
>
> iii. Negligently failing to warn visitors to the Great Smoky Mountains National Park of the potential dangers of falling trees along U.S. Highway 441.

> iv. Negligently failing to devise, implement and follow an appropriate tree hazard management plan for the identification and removal of hazardous trees such as the one which fell in this case. . . .
>
> v. Negligently failing to train its employees as to the necessity for and the appropriate method of identifying tree hazards and removing hazardous trees.
>
> vi. Negligently failing to provide sufficient manpower for the proper identification and removal of hazardous trees pursuant to the mandate of NPS Special Directive 76-9. . . .
>
> vii. Negligently failing to identify and remove the hazardous trees which fell and struck Plaintiff's decedent. . . .

Doc. 24 at 5-6. The plaintiffs also claim that the defendant's actions were wanton with regard to the failures alleged above. Ms. Schreiner claims that she suffered mental anguish because of the government's alleged negligent and/or wanton conduct.

On September 4, 1991, the defendant filed a motion for summary judgment on the grounds that Schreiner and Autery [hereinafter "plaintiffs"] were licensees as a matter of North Carolina law, and as such the United States was only under a duty not to willfully injure them or to wantonly or recklessly expose them to danger. Doc. 23 at 6-9. The United States claims that it did not breach this duty. *Id.* at 9-10.[1]

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[1] Alternatively, the United States claims that it did not breach its duty of care even if it owed a duty of reasonable care

The plaintiffs assert that even if they were licensees, the United States voluntarily assumed a higher duty toward them by undertaking a tree hazard plan and by classifying park visitors as invitees rather than licensees. Doc. 42 at 7-8.

In its answer to the plaintiffs' second amended complaint (Doc. 45) and its supplemental memorandum in support of its motion for summary judgment (Doc. 49), the defendant raises as a defense the "discretionary function exception" to the Federal Tort Claims Act, 28 U.S.C. § 2680(a).

Pursuant to 28 U.S.C. § 636(b)(1)(B), the motion for summary judgment was referred to the Magistrate Judge, who on January 24, 1992, issued a report and recommendation. Doc. 59. The Magistrate Judge, in recommending that the motion for summary judgment be denied, found that "no reasonable range of choices existed with respect to the Park Services' inaction, and, as such, the discretionary function doctrine of 28 U.S.C. § 2680(a) is inapplicable." *Id.* at 12. The Magistrate Judge also found that, as a matter of North Carolina law, plaintiffs were licensees and not invitees. *Id.* at 14. The United States filed objections to the Magistrate Judge's Report and Recommendation on January 28, 1992. Doc. 60.

On the day of the trial, before testimony was taken and after due and proper consideration of all portions of

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to the plaintiffs. Doc. 24 at 7. Furthermore, the United States contends that it is not liable except to the extent that sovereign immunity has been waived. *Id.*

this file deemed relevant to motion for summary judgment, including the objections of the United States and the arguments of counsel, the court advised counsel that the Report and Recommendation of the Magistrate Judge as to the status of the plaintiffs as licensees was adopted as the opinion of this court, as is more fully explained below.

After due consideration of the testimony and demeanor of the witnesses at trial and of the pleadings, exhibits, and arguments offered by both parties, this court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Agreed Facts

A. This accident occurred within the State of North Carolina along U.S. Highway 441 [also known as Newfound Gap Road] in the Great Smoky Mountains National Park which is owned and operated by the defendant, United States of America.

B. Roy Franklin Autery was killed instantly on July 5, 1989 at approximately 9:55 a.m. as he was driving south on the Newfound Gap Road approaching the Oconaluftee Visitor's Center when two (2) locust trees located at forty-five (45) feet up the west bank of the road fell into the roadway.

C. Charlotte Schreiner was a passenger in the vehicle driven by Mr. Autery and was injured as well in the accident.

D. Newfound Gap Road is a two-lane road traveling through a nearly straight segment where the accident occurred. The traffic was generally heavy for the time of day due to increased July 4th holiday visitation.

E. The accident occurred near a road sign which states: "35 Miles Per Hour, Congested Area."

F. At the time of the accident the sky was cloudy, but dry. There was no significant wind. The temperature was moderate.

G. Roy Franklin Autery was pronounced dead at the scene of the accident.

H. That the death certificate attached as Exhibit A to Plaintiffs' Request for Admissions filed April 4, 1991 is a true and correct copy of the death certificate issued by the appropriate authorities concerning the cause of death of Roy Franklin Autery.

I. That the list of general expenses attached as Exhibit B to the Request for Admissions filed April 4, 1991 is a true and correct copy of the expenses incurred by the Estate of Roy Franklin Autery in his burial.

J. That the list of medical expenses, with supporting documents, identified as Exhibit C in Plaintiffs' Request for Admissions of April 4, 1991 is a true and correct list of medical expenses which were reasonably and necessarily incurred by plaintiff, Charlotte Schreiner, concerning her injuries suffered in the accident made the basis of this suit.

K. That the medical records concerning the treatment received by Charlotte Schreiner by Dr. Provost at C.J. Harris Community Hospital, 59 Hospital Road, Sylva,

North Carolina 28779, and attached as Exhibit D to Plaintiffs' Request for Admissions filed April 4, 1991 are true and correct copies of the medical records maintained at that institution concerning Ms. Schreiner's treatment.

L. That the medical records from the University of South Alabama Medical Center attached as Exhibit E to the Plaintiffs' Request for Admissions of April 4, 1991 are true and correct copies of medical records maintained by that institution concerning the care and treatment of Charlotte Schreiner as a result of the injuries made the basis of this suit.

M. That the divorce decree attached as Exhibit F to the Request for Admissions of April 4, 1991 is a true and correct copy of the divorce decree applicable to Roy Franklin Auery and his first wife, Janice Autery, setting forth the child support, alimony and other obligations of Roy Franklin Autery to Janice Autery and for the benefit of the children of the marriage, Ronald F. Autery and Amanda E. Autery.

N. That the letter of March 21, 1991 signed by G.S. Weeks, Human Resources Associates of UOP Molecular Sieve Plant, Post Office Box 11486, Chickasaw, Alabama 36611 and identified as Exhibit G to the Request for Admissions of April 4, 1991, constitutes a list of 1989 earnings of Roy F. Autery from January 1, 1989 through July 23, 1989.

O. That the individual income tax returns attached as Exhibit H to the Request for Admissions of April 4, 1991 are true and correct copies of the returns filed on behalf of Roy Franklin Autery for the years 1989, 1988, 1987, 1986 and 1985.

P. That, according to the income loss report for Mr. Roy F. Autery prepared by the plaintiffs' economic expert witness, A.M. Agapos, Ph.D., the total present value of lost income and fringe benefits, when using a 0% growth rate and a 2.0% after-tax discount was $572,239.65.

Q. That Roy Franklin Autery's date of birth was September 1, 1948 and his date of death was July 5, 1989.

R. That Roy F. Autery had a remaining expected work life as of the date of his accident of twenty-one (21) years.

S. That Roy F. Autery completed the twelfth grade but had no further formal education.

T. That Roy F. Autery had an annualized income at the time of his death of $35,356.00 and an after-tax income of $29,702.00.

U. That at the time of the accident made the basis of this suit the Great Smoky Mountain National Park did not have in force and effect a written tree hazard management plan.

V. The Great Smoky Mountain National Park is the most visited national park in the country with annual visitors of approximately 8.5 million people.

W. In February 1990 the supervisor of the Great Smoky Mountain National Park, Mr. Cole, signed and implemented the first written hazardous tree policy for the Great Smoky Mountain National Park.

Undisputed Facts

1) The estate of Roy Franklin Autery incurred funeral expenses in the amount of $4574.75.

2) Charlotte Schreiner incurred medical and related travel expenses in the amount of $477.30.

3) Plaintiffs filed their administrative claims in a proper and timely manner.

Further Findings by the Court

4) The tree in question was approximately fifty years old, approximately seventy feet in height, and fell due to root rot.

5) Although GSMNP did not have a written, formalized tree hazard management plan until June 1990, it was the established practice at the park for all employees to identify and report known or potentially hazardous trees to supervisors or maintenance personnel for appropriate action. Clarence Rice, an employee of the park since 1969 and Director of Safety and Concessions since 1975, testified at the trial that this had been the practice of the park for as long as he worked there. Also, in a memo dated July 30, 1990, Park Superintendent, Randall Pope stated that:

> Although *no formalized,* documented hazard tree management policy was established before June 8, 1990, for the Great Smoky Mountain National Park, it *has been standard procedure for all employees to report known or potentially hazardous trees to area supervisory ranger or maintenance personnel for timely and appropriate action. . . .* Along Newfound Gap Road (U.S. 441), patrol

> rangers or other employees traveling the road report dead or hazardous trees, hanging dead limbs, etc. to the roads foreman for appropriate action. Also, trees and limbs have been removed for sight distance along Newfound Gap Road. This has been an ongoing procedure for many years. Too much growth along the road, especially on curves, blocks the view of oncoming vehicles. . . .
>
> *We established a procedure years ago,* though not documented policy, whereby all employees would make every reasonable effort within the constraints of budget, manpower, and equipment available *to recognize and report for removal hazard trees along roads,* in campgrounds, in picnic areas, along paved trails, and around structures (emphasis added).

6) GSMNP received the following mandate by National Park Service Special Directive 76-9 (Health and Safety of Park Visitors, *October 5, 1976*):

> Protection of the visitor, and park and concessioner employees, from violations of laws and regulations and from hazards inherent in the park environment, is a prime responsibility of the National Park Service. *The saving and safeguarding of human life takes precedence over all other park management activities,* whether the life is of the visitor, concessioner, or park employee . . . . (emphasis added).

After quoting this directive, the Tree Hazard Management Plan makes the following statement, which the court finds – in light of the July 30, 1990, memo from Randall Pope quoted supra – was the policy at GSMNP at the time of the accident made the basis of this suit:

> Therefore, the policy of the National Park Service at Great Smoky Mountain National Park will be that we will make every reasonable effort within the constraints of budget, manpower, and equipment available to detect, document, remove, and prevent tree hazards, as provided for by this Tree Hazard Management Plan.

7) At the time of the accident made the basis of this suit, and for at least seven months before the accident, the defendant knew of the peculiar risks attendant to black locust trees in high-density areas. Defendant's expert, plant pathologist William H. Sites, testified that the following information, which was contained in a letter from Dr. Sites to Mr. Keith Langdon dated November 9, 1988, was "critical safety information":

> *Black locust trees* are short-lived and due to decay (following borer activity), break up and drop limbs and tops. Avoid them in new areas; *remove* them *when possible* in existing areas, (emphasis added).

There is also evidence that Mr. Tim Stubbs, the primary preparer of the written tree hazard management plan, received the following information from Dr. Sites in a letter dated November 26, 1986:

> *Black locust* is a short-lived tree and is very prone to limb failure because of the activities of the locust borer and the fungus *Fomes rimosus.*

8) The information contained in the Sites letter to Dr. Langdon was critical safety information. Defendant's expert Dr. Sites testified that it was "critical safety information." Mr. Tim Johnson, plaintiffs' tree safety expert,

testified that it was "valuable, critical safety information."

9) Mr. Langdon is the Supervisory Natural Resource Specialist at GSMNP, and was instrumental in the formulation of the written tree hazard plan. He received the information noted above in conjunction with the written distillation of the plan and testified at trial that, *prior to the accident*, he had meetings with park rangers and maintenance personnel regarding the information contained in the letter from Dr. Sites. He also testified that he circulated the letter to Tim Stubbs (the primary plan preparer), to Dean Berg (Mr. Langdon's supervisor), and Joe Abrell (Mr. Langdon's division chief), and that he discussed the information with several maintenance people from both sides of the park. These maintenance persons had the necessary knowledge to make a close inspection and to identify the black locust tree hazard. These people included Louis Smith (the person responsible for tree maintenance on the North Carolina side of the park), Frank Hyatt (facility manager responsible for maintenance on the North Carolina side of the park), Robert Hockman (facility manager responsible for maintenance on the Tennessee side of the park), Don Stevenson (a maintenance foreman on the Tennessee side of the park), James Patty (a maintenance worker on the Tennessee side of the park), and Buford Price (park personnel).

Mr. Langdon and his superiors, who were charged with the duty to prepare a *written* tree hazard plan and who later prepared such a plan, had or should have had the knowledge that upon the receipt of Dr. Sites' warning of the black locust tree danger, were negligent in not taking more positive, aggressive action to eliminate the

hazard in areas such as the place where the accident occurred.

There is no evidence that any actions were taken with regard to reducing the hazards identified with the black locust trees.

Regarding the constraints of personpower and budget, there is no indication in the evidence that the defendant took any action the reasonableness of which would be effected by these considerations. If the maintenance people responsible for identifying and removing tree hazards had acted on the information they had received prior to the accident, the black locust tree here in question could have been removed. If Mr. Langdon and his superiors had acted more promptly and aggressively, the tree involved in the accident could have been removed. The tree was in a congested, urban, or high density area. It was positioned on a downward slope toward the road and was of sufficient height that from the road it easily could have been ascertained that it would fall across the road if it happened to fall. Had the knowledge that several of the maintenance personnel received from discussion with Mr. Langdon been acted upon, they had sufficient information to make a close inspection of the tree, which would have revealed its diseased condition, and to remove it. The failure of the defendant to identify and remove the tree that killed Mr. Autery and injured Ms. Schreiner was a failure by the defendant to use due care in the safeguarding of human life by the removal of black locust tree hazards.

The maintenance personnel were divided between the Tennessee side (or west side) of the mountain range

and the North Carolina side (variously referred to as the east or south side) of the mountain range. There were 33 miles of paved road on the North Carolina side of the park, and the only a small portion of that was located in urban, congested, or high density areas. The testimony was that there were very few black locust trees, if any, near the immediate environs of the campgrounds, visitor centers, or the pedestrian walkways at or near these two particular areas. The testimony also revealed that there were relatively few black locust trees on downward slopes of such height that, had they fallen, would have struck motor vehicles or persons in any of these areas.

This court does not find budget and personpower constraints, persuasive in these circumstances.

10) The tree that struck Mr. Autery's car was variously described as one tree with two trunks and as two trees with a common root system. The difference is basically semantic. The court will refer to it as one tree with two trunks. The accident happened when one trunk of the tree "failed due to a loss of anchorage which resulted from infection by the root and butt rot fungus *Armillaria mellea.*" The upper part of the first trunk was also effected by *Fomes rimosus,* another decay fungus. When that trunk fell, it torqued down the other trunk through the common root. Plaintiffs' exh. N-10. The first trunk hit the car and caused Mr. Autery's death and Ms. Schreiner's injuries, while the second trunk, which also had heart rot, fell into the road. *Id.*

11) The black locust tree that caused Mr. Autery's death and Ms. Schreiner's injuries failed because of the specific hazard pointed out in the letter from Dr. Sites to

Mr. Langdon and the letter from Dr. Sites to Mr. Stubbs. Dr. Sites testified to this at trial, and this testimony was not disputed.

12) The black locust tree that caused Mr. Autery's death and Ms. Schreiner's injuries had visible, external symptoms of the decay that caused it to fall. The external decay was on the side of the tree that was not visible from the highway. Plaintiffs' expert Johnson testified that the portions of the tree he examined after the accident had a large exterior portion of decay. Mr. Louis Smith, an engineering equipment operator foreman at GSMNP, observed the tree in the position in which it fell on the day of the accident and testified that almost half of the bark appeared to have been missing from the tree when it fell. Defendant's tree expert Dr. Sites testified that the decay he observed in the tree after it fell would have evidenced itself on the tree's exterior.

13) The black locust tree that caused Mr. Autery's death and Ms. Schreiner's injuries was located approximately 200 yards from the Oconaluftee Visitor's Center. The tree hazard management plan adopted in 1990, which evidenced GSMNP's *prior policy* and practice, stated that "[t]he areas of the park in which the NPS will inspect and remove tree hazards are any 'urbanized' areas of sustained visitor or employee use."

At the trial plaintiffs' expert, Mr. Tim Johnson, described the area at which the tree fell as a "priority 1 urbanized area." Clarence Rice, Director of Safety and Concessions at GSMNP, described the area as a "high impact area." Defendant's expert Dr. Sites testified that he would consider the area a higher priority area than all

other areas except visitor centers, campgrounds, and pedestrian walkways adjacent to visitor centers and campgrounds. The defendant stipulated that the portion of the road where the accident happened was designated a "congested area" by a road sign.

It is clear from the evidence that, because of the proximity of the accident to the Oconaluftee Visitor Center, the accident happened in a location prone to heavy, sustained use by visitors to the park. The accident occurred on the North Carolina side of the mountain range, which is referred to as the east or south side of the park. Oconaluftee Visitor Center is one of three visitor centers in the park. The brochure for GSMNP suggests that visitors entering from the North Carolina (or east or south) side of the park should make the Oconaluftee Visitor Center their first stop in the park. The GSMNP is the most visited park in the United States with annual visitors of approximately 8.5 million people. Assuming that between 2.125 to 4.25 million of these people (1/4 to 1/2 of the 8.5 million annual visitors) travel past Oconaluftee Visitor Center within a year, the daily average of people passing the scene of this accident would be between 5,822 and 11,644. These averages do not reflect the seasonal variations of visitor traffic and actually would be higher because of the fact that the accident occurred in a high impact, congested, or urbanized area, nor do the averages reflect that GSMNP visitor traffic is heaviest during the summer months and that the accident occurred during a national holiday season, July 5.

The court finds that the scene of the accident here at question was located in an high impact, congested, or urbanized area that the defendant knew or should have

known was subject to heavy, sustained use by visitors to the park.

14) The inspection of trees for tree hazards at GSMNP was and is conducted initially from trucks driven along the road by rangers and maintenance personnel, although all park employees were and are supposed to report any potentially hazardous trees of which they become aware. Once a tree that appears to be hazardous is reported, the tree is inspected closer by the maintenance personnel and appropriate action is taken.

15) The failure of the defendant to implement, after becoming aware prior to the accident of the hazards black locust trees presented, a closer inspection of tree hazards with regard to high impact areas such as the scene of the accident was a failure to use due care on the part of the defendant in the course of safeguarding human life by identifying and removing tree hazards.

The court is not impressed by defendant's arguments to the effect that GSMNP is so large that any more rigorous scheme of inspection would be impossible, or at least unreasonable. The evidence reflects that there are 33 miles of paved road on the North Carolina side of the park. Of this 33 miles, only a small portion would be at or near the high impact, congested, or urbanized areas of the park on the North Carolina side.

16) There is insufficient evidence to sustain the wanton count. There is no evidence that the defendant's failure to utilize the information with regard to black locust trees would constitute wantonness under North Carolina law.

17) In their administrative claims, Mr. Autery's estate sought $500,000.00 and Ms. Schreiner sought $50,000.00. The plaintiffs contend that they should be allowed to seek more than these amounts in this action because later discovery showed evidence of wantonness that was not discoverable at the time of the administrative claim. Mr. Autery's estate also contends that they should be able to seek more because their actuarial expert showed that Mr. Autery's future earnings exceed $500,000.00. However, there is no evidence that the amount of Mr. Autery's future earnings was not reasonably discoverable before the administrative claim was made. The court finds that the amount of Mr. Autery's future earnings could reasonably have been ascertained before the administrative hearing was made.

18) Mr. Autery was divorced from Janice Autery on March 7, 1989. He had two minor children by that marriage.

19) The court finds that the defendant's negligence caused Ms. Schreiner severe emotional distress and that it was reasonably foreseeable that such conduct would cause her such emotional distress. Ms. Schreiner was in the car when the accident happened. After the accident, she was still conscious and screamed as she saw Mr. Autery slumped over the steering wheel. She testified that she was in love with Mr. Autery and that they had plans to be married. However, she offered no evidence on the length of the relationship. There is no evidence of any relationship between Ms. Schreiner and Mr. Autery's children. Ms. Schreiner testified that the accident changed her life, caused her to have nightmares, and caused her depression.

20) Nell D. Autery is the administratrix of the estate of Roy Franklin Autery.

CONCLUSIONS OF LAW

The United States is the defendant in this tort action, and the action arises pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b) [hereinafter "FTCA"].

Under the Federal Tort Claims Act, the United States is subject to tort liability "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. This liability attaches "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

Discretionary Function

At the close of evidence, the court asked counsel for both sides whether any evidence with regard to the discretionary function exception had been presented at trial that had not been submitted in conjunction with defendant's motion for summary judgment. Counsel for both sides stated that no additional evidence had been presented. After due and proper consideration of the applicable law, the evidence and arguments presented by both sides, and the objections to the Report and Recommendation filed by the defendant, this court adopts the opinion of the Magistrate Judge, as set out below, with regard to the applicability of the discretionary function exception to this case:

Under the doctrine of sovereign immunity, an action may be maintained against the government only if the government consents to suit. *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). The extent of the court's jurisdiction is defined by the terms of the government's consent to suit. *Lehman v. Nakshian*, 453 U.S. 156, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981). Thus, a plaintiff must comply with the terms of the government's consent to suit, including time limitations.

The Federal Tort Claims Act (hereinafter FTCA) allows waiver of the sovereign immunity of the United States in cases involving negligence by government employees. The FTCA provides for suits against the United States for damages

> "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. § 1346(b). However, this waiver of sovereign immunity is limited by certain statutory provisions. Among these provisions is the "discretionary function" exception, which Defendant asserts applies in this action, thereby divesting this Court of subject matter jurisdiction. *See Zumwalt v. United States*, 928 F.2d 951, 952 (10th Cir.1991). The propriety of the application of this exception is therefore a threshold

issue which precedes any further analysis of the Plaintiffs' claims.

The discretionary function exception provides that the United States is not liable for

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

This exception has been the subject of several decisions by the United States Supreme Court.[2] The most recent decision of the Supreme Court addressing the discretionary function exception is found in *United States v. Gaubert*, ___ U.S. ___, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). In *Gaubert* the Supreme Court determined that certain actions of federal regulators in operating and managing a bank were within the discretionary function exception of the FTCA. In reaching this determination the Supreme Court stated as follows:

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[2] *See e.g. Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984); *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955); *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953).

The exception covers only acts that are discretionary in nature, acts that "involv[e] an element of judgment or choice," and "it is the nature of the conduct, rather than the status of the actor," that governs whether the exception applies. The requirement of judgment or choice is not satisfied if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option to adhere to the directive."

Furthermore, even "assuming the challenged conduct involves an element of judgment," it remains to be decided "whether that judgment is of the kind that the discretionary function exception was designed to shield." Because the purpose of the exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," when properly construed, the exception "protects only governmental actions and decisions based on considerations of public policy."

. . . .

[T]herefore, if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. If the employee violates the mandatory regulations, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if the regulation allows the employee discretion, the very existence of the

> regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.

Id., 111 S.Ct. at 1273-74 (citations omitted). Therefore, a court must examine the nature of the challenged conduct and determine if it was "a matter of choice for the acting employee or whether it is specifically prescribed by a federal statute, regulation, or policy. *Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988). "[I]f the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function to protect." *Id.* Second, if the challenged conduct is a product of judgment or choice, "a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* A discretionary decision is only protected if "based on considerations of public policy." *Id.*

Thus, in the case at bar, the inquiry for this Court is whether the Park Service officials had discretion under their Tree Hazard Management Plan to remove "hazardous" trees and, if so, whether such discretion is the type which Congress intended to shield from liability by virtue of § 2680(a).

It is undisputed by the parties that a hazardous tree plan was in effect at GSMNP at the time of the accident. (*See* Doc. 24) However, it was an unwritten policy or procedure. According to one park employee, this unwritten policy required all employees to report all "known

or potentially hazardous trees to area supervisory ranger or maintenance personnel for timely and appropriate action." (*See* Doc. 42, Ex. E-12, E-13, Ex. H at 6) The evidence presented establishes that the Park Service attempted to establish a written policy regarding hazardous tree management as early as May, 1984 (Doc. 42, Ex. E-12), however, a final draft of the plan was not implemented until June 8, 1990, eleven months after this incident occurred. (*See* Doc. 42, Ex F) Included in that final draft is a reference to National Park Service Special Directive 76-9 (Health and Safety of Park Visitors, October 5, 1976). The portion of the draft containing this provision provides as follows:

> E. *Tree Hazard Management Policy – Great Smoky Mountains National Park* Recognizing not only a serious problem with public safety, but also a potential for very large tort claims, most government agencies, including some National Park Service areas, have now adopted policies promoting the detection, documentation, removal, and prevention of tree hazards. (6, 7, 8) Also, each area of the National Park Service has been given the following mandate by NPS Special Directive 76-9 (Health and Safety of Park Visitors, October 5, 1976):
>
> Protection of the visitor, and park and concessioner employees, from violations of laws and regulations and from hazards inherent in the park environment, is a prime responsibility of the National Park Service. The saving and safeguarding of human life takes precedence over all other park management activities, whether the life is of the visitor, concessioner, or park employee. The Service will work closely

with other responsible Federal, State, and local agencies in carrying out this responsibility. (9) Therefore, the policy of the National Park Service at Great Smoky Mountains National Park will be that we will make every reasonable effort within the constraints of budget, manpower, and equipment available to detect, document, remove, and prevent tree hazards, as provided for by this Tree Hazard Management Plan.

(Doc. 42, Ex. F)

Defendant maintains that implementation and execution of the Tree Hazard Management Plan in effect at the time of the incident called for discretionary action, since under the plan an employee must go through a decision-making process before a tree is in fact removed. However, in light of National Park Service Special Directive 76-9, which was apparently in effect at the time of the incident involving the Plaintiffs, there is certainly room to argue whether the decision-making process to remove a hazardous tree was in fact discretionary. Such argument is strengthened by evidence submitted by Plaintiffs that indicates that the Park Service was aware of the hazardous nature of black locust trees several months before the accident occurred. This evidence is memorialized in a memo from Dr. William H. Sites of the U.S. Department of Agriculture Forest Service to Dr. Keith Langdon of the National Park Service at GSMNP. (Doc. 42, Ex. F(a)) In that memo, Dr. Sites makes the following assessment about black locust trees: "Black locust trees are short-lived and due to decay (following borer activity), breakup and drop limbs and tops. Avoid

> them in new areas; remove them when possible in existing areas."
>
> Therefore, in the undersigned's opinion, the fact that the Defendant chose not to take precautionary measures in regard to black locust trees does not invoke the protection of § 2680(a). Based upon the evidence presented to this Court, no element of choice was presented when the Defendant failed to remove black locust trees which were located within "striking" distance of the park roadway. Since the danger presented by these trees was known by park officials, there was no discretion to fail to take remedial measures. Surely, it cannot be contended that the park officials had discretion to decide whether overriding policy considerations of protecting the trees and the natural state of the area outweighed the safety of humans using the park roadway. Accordingly, it is the opinion of the undersigned that no reasonable range of choices existed with respect to the Park Services' inaction, and, as such, the discretionary function doctrine of 28 U.S.C. § 2680(a) is inapplicable.

This court further adds that the evidence reflects a failure of duty by failing to take action on known or potential hazards presented by black locust trees under the defendant's long-standing *policy* decision to protect human life first and foremost in the park. It can be argued that the *written* tree hazard plan, not yet adopted at the time of the accident, was a policy decision protected by the discretionary function exception. This court has found a policy to protect human life by removal of tree hazards has been in existence at GSMNP for many years. The

maintenance personnel charged with removal of hazardous trees learned of the black locust tree hazard before the accident. The implementation of the long-standing policy decision is not a choice that brings the defendant within the discretionary function exception.

The GSMNP Resource Management Division, which included Mr. Langdon and his superiors who were drafting the written tree hazard management plan, knew or should have known upon receipt of Dr. Sites' warning that the existing policy demanded immediate, positive, aggressive action. Their failure to take such action was not a choice that brought them within the discretionary function exception. In *Gaubert*, the Supreme Court discussed *Berkovitz* and stated:

> We found that some of the claims fell outside the exception because the agency employees had failed to follow the specific directions contained in the applicable regulations, i.e., in those instances, there was no room for choice or judgment.

___ U.S. at ___, 111 S.Ct. at 1274, 113 L.Ed.2d at 347.

In the case sub judice, this court finds the defendant's employees failed to follow the directions to protect human life first and foremost.

The Magistrate Judge further stated that:

> Alternatively, assuming *arguendo* that the Park Service was presented with a choice of whether or not to take any action with respect to the black locust tree problem, the undersigned is of the opinion that such choice was not one which Congress intended to be shielded from liability by virtue of § 2680(a). *See United States*

v. Varig Airlines, 467 U.S. 797, 813, 104 S.Ct. 2755, 2764, 81 L.Ed.2d 660 (1984) (the ultimate question is whether the challenged acts are of the nature and quality that Congress intended to shield from tort liability). If Congress intended a decision such as the one made in this case to be shielded from liability, then the Federal Torts Claim Act would, for all practical purposes, be a nullity. If Congress intended to protect every such decision, then virtually every plaintiff who has been injured by governmental negligence or wrongdoing will be left without a forum to redress the wrong. Therefore, it is the opinion of the undersigned that Congress did not intend to shield a decision such as the one made in the present case by Park Service officials from liability. Therefore, it is the recommendation of the undersigned that defendant's motion for summary judgment based on the discretionary function exception be denied.

Standard of Care

Prior to trial the court, orally adopted, and has adopted in writing, the recommendation of the Magistrate Judge that plaintiffs be found licensees and not invitees as a matter of North Carolina law. This left the question of the proper standard of care to be applied to this case. The United States contends that because the plaintiffs were licensees, the United States was only under a duty not to willfully injure them or to wantonly or recklessly expose them to danger. The plaintiffs contend that the United States voluntarily assumed a higher duty of care by undertaking a program of tree hazard removal under which the protection of human life was

the paramount goal. The plaintiffs argue that the United States assumed the duty to act reasonably.

Numerous courts have found that "[w]hen an agency of the United States voluntarily undertakes a task, it can be held to have accepted the duty of performing that task with due care." *Rogers v. United States*, 397 F.2d 12, 14 (4th Cir. 1968). *See also Neal v. Bergland*, 646 F.2d 1178, 1181-82 (6th Cir.1981), *aff'd sub nom. Block v. Neal*, 460 U.S. 289, 103 S.Ct. 1089, 75 L.Ed.2d 67 (1983); *Gibson v. United States*, 457 F.2d 1391 (3d Cir.1972); *Creasy v. United States*, 645 F.Supp. 853 (W.D.Va.1986); *Loritts v. United States*, 489 F.Supp. 1030 (D.Mass.1980).

However, because the liability of the United States with regard to the FTCA is determined by reference to "the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b), whether the United States can be held to have assumed the duty to act reasonably in this case depends first upon whether North Carolina law recognizes the common-law "Good Samaritan Doctrine," whereby "one who undertakes to act, even though gratuitously, is required to act carefully and with exercise of due care and will be liable for injuries proximately caused by failure to use such care." *Creasy*, 645 F.Supp. at 855 (quoting *Neal*, 646 F.2d at 1181-82). *See also Block v. Neal*, 460 U.S. 289, 294 n. 3, 103 S.Ct. 1089, 1092 n. 3, 75 L.Ed.2d 67 (1983).

The Supreme Court of North Carolina has stated on several occasions that "[t]he law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from

harm, and calls a violation of that duty negligence. It is immaterial whether the person acts in his [or her] own behalf or under a contract with another." *Council v. Dickerson's, Inc.*, 233 N.C. 472, 474-75, 64 S.E.2d 551, 553 (1951) (citing Prosser, Prosser on Torts § 33). *See also Toone v. Adams*, 262 N.C. 403, 408, 137 S.Ed.2d 132, 136 (1964).

After consideration of the actions taken by the United States with regard to its undertaking of a program of tree hazard removal that had the safeguarding of human life as its paramount goal, this court concludes that the United States entered upon such active course of conduct. Thus, at the time of the accident here at issue, the United States owed to the plaintiffs the duty to exercise ordinary care with regard to its tree hazard removal policy.

The Negligence Claims

It is this court's conclusion that the government was negligent in failing to maintain the area where the accident occurred by failing to identify and remove the hazardous trees that struck Mr. Autery's car. Mr. Langdon, a Natural Resources Specialist at GSMNP, received information from Dr. William Sites about the hazardous nature of black locust trees, and Mr. Langdon communicated this information to his superiors and to various maintenance personnel. Yet the government failed to carry out, in a timely and adequate manner, a practice of identifying and removing trees that were known to be particularly hazard prone from high-density areas such as the area in which Mr. Autery's car was struck.

Furthermore, the defendant was negligent in failing to properly inspect the trees in the area in which the accident occurred. Had the knowledge that several of the maintenance personnel received from discussion with Mr. Langdon been acted upon, the maintenance personnel had sufficient information to make a close inspection of the tree in question, which would have revealed its diseased condition, and to remove it. The failure of the defendant to inspect, identify, and remove the tree that killed Mr. Autery and injured Ms. Schreiner was a failure by the defendant to use due care in the safeguarding of human life by the removal of black locust tree hazards.

Mr. Langdon, his superiors, and several maintenance personnel knew, by reason of Dr. Sites' letter, of the hazards posed by black locust trees. The defendant had notice of the peculiar hazards of the black locust trees, but failed to use ordinary care in safeguarding the lives of park visitors by not taking more immediate, aggressive steps to disseminate this information to employees and by not instituting a program for immediately identifying and removing the hazards that black locust trees were known to pose.

Therefore, the court finds the defendant negligently breached the duty stated in each of the following claims referred to above:

(1) i. Negligently failing to properly maintain the National Park area where the accident occurred by failing to identify and remove the hazardous trees.

The court further finds that the defendant's failure to so act was the proximate cause of the plaintiffs' death and injuries;

> (2) vii. Negligently failing to identify and remove the hazardous trees which fell and struck plaintiff's decedent.

The court further finds that the defendant's failure to act was the proximate cause of the plaintiffs' death and injuries;

> (3) ii. Negligently failing to properly inspect the trees in the National Park along the area where this accident occurred.

The court further finds that the defendant's failure stated in this claim was the proximate cause of the plaintiffs' death and injuries;

> (4) iv. Negligently failing to devise, implement and follow an appropriate tree hazard management plan for the identification and removal of hazardous trees such as the one that fell in this case.

The court further finds that the defendant's failure to act was the proximate cause of the plaintiffs' death and injuries.

Having found the defendant guilty of negligence on four of the seven claims, the court finds it would add nothing to this opinion to discuss the remaining three claims.

The Wanton Claim

The Supreme Court of North Carolina describes wanton conduct as "an act manifesting a reckless disregard for the rights and safety of others." *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244, 248 (1985) (citations omitted). "[T]he word 'wanton' implies turpitude, and that the act is committed or omitted of willful, wicked purpose; that the term 'willfully' implies that the act is done knowingly and of stubborn purpose but not of malice." *Wagoner v. North Carolina R. Co.*, 238 N.C. 162, 77 S.E.2d 701, 705 (1953) (citation omitted); *see also Marsh ex rel Marsh v. Trotman*, 96 N.C.App. 578, 386 S.E.2d 447, 448 (1989) (quoting *Wagoner*); *Nance v. Robertson*, 91 N.C.App. 121, 370 S.E.2d 283, 284 (1988) (quoting *Wagoner*). "Wanton and willful negligence rests on the assumption that [the defendant] knew the probable consequences, but was recklessly, wantonly, or intentionally indifferent to the results." *Wagoner*, 77 S.E.2d at 706. The court finds that there was no wicked intent or recklessness on the part of the defendant. Therefore, the plaintiffs' wantonness count fails.

Damages

After the plaintiffs' administrative claims were denied, plaintiffs instituted this action. In the amended complaint, Mr. Autery's estate seeks $500,000.00 in compensatory damages on the negligence claims and Ms. Schreiner seeks $500,000 in compensatory damages on the negligence claims. The undisputed evidence shows that Mr. Autery's estate suffered damages of $4574.75 in funeral expenses and $572,239.65 in lost income and

fringe benefits, for a total of $576,814.40. At the trial, plaintiffs' counsel argued that Mr. Autery's estate should be allowed to recover this total amount. The undisputed evidence shows that Ms. Schreiner suffered damages of $212.30 in medical expenses and $265.00 in related travel expenses, for a total of $477.30.

In their administrative claims, Mr. Autery's estate sought $500,000.00 and Ms. Schreiner sought $50,000. A claimant under the Federal Tort Claims Act is ordinarily restricted in the amount he or she may recover upon a finding of governmental liability to the amount specified in the administrative claim, "except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim." 28 U.S.C. § 2675(b). Both plaintiffs contend that they should not be limited to the amounts of their administrative claims because of newly discovered evidence of defendant's wantonness. Mr. Autery's estate contends that it should not be limited to $500,000.00 because it did not have available a precise amount of Mr. Autery's future earnings at the time of the administrative claim.

Because of this court's findings that defendant's conduct was not wanton and that Mr. Autery's future earnings could reasonably have been ascertained before the administrative claim, the court concludes that the FTCA bars the plaintiffs from seeking more than the amounts set out in their administrative claims. The court finds that Mr. Autery's estate is entitled to compensatory damages in the amount of $500,000.00.

To recover for negligent infliction of emotional distress, North Carolina law requires that the plaintiff prove that the defendant engaged in negligent conduct, that it was reasonably foreseeable that the negligent conduct would cause the plaintiff severe emotional distress (often referred to as "mental anguish"), and that the conduct did in fact cause the plaintiff severe emotional distress. *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85, 97 (1990). A plaintiff may recover for his or her severe emotional distress arising due to concern for another person if the plaintiff can prove that the emotional distress was a proximate and foreseeable result of the defendant's negligence. *Id.*

The evidence established that Ms. Schreiner suffered and suffers from severe emotional distress as a result of defendant's negligent conduct. "Factors to be considered on the question of foreseeability in cases such as this include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." *Id.* 395 S.E.2d at 98. Ms. Schreiner was present in the car when Mr. Autery was killed as a result of defendant's negligence. Ms. Schreiner's testimony demonstrated that they had close emotional bonds. Furthermore, although physical impact and injury are not required elements of the tort of negligent infliction of emotional distress in North Carolina, *id.* at 97, the court notes that Ms. Schreiner was in fact injured by the defendant's negligence. North Carolina law does not require that the plaintiff demonstrate a subsequent physical manifestation of the emotional distress. *Id.* The court concludes that Ms.

Schreiner has established by a preponderance of the evidence her case for negligent infliction of emotional distress and finds that she is entitled to $477.30 for her actual damages and $20,000.00 for defendant's negligent infliction of emotional distress.

It is ORDERED, ADJUDGED, and DECREED that Mr. Autery's estate's compensatory damages exceeded $500,000.00 but that Mr. Autery's estate's recovery is limited to that amount by 28 U.S.C. § 2675(b), and the court awards that amount, $500,000.00, to Nell Autery, as administratrix of the estate of Roy Franklin Autery. The court awards Ms. Schreiner $477.30 for her medical and travel expenses and $20,000.00 for negligent infliction of emotional distress.

APPENDIX D

PREFACE TO GSMNP'S WRITTEN TREE HAZARD MANAGEMENT PLAN

LOGO LOGO

UNITED STATES DEPARTMENT OF THE INTERIOR

NATIONAL PARK SERVICE
Great Smoky Mountains National Park
Gatlinburg, Tennessee 37738

IN REPLY REFER TO

N1617

June 8, 1990

Memorandum

To: See Listing

From: Superintendent

Subject: Tree Hazard Management Plan

Attached is the Tree Hazard Management Plan for the park. Please read it carefully as it is established park policy that must be followed regarding the prevention, identification and removal of tree hazards.

We have always removed trees that were obvious hazards. Since the establishment of the park, however, several things have changed that make the formalization of our procedures a logical next step. Lower elevations where many of our facilities are located, have reforested and those first, pioneer species of trees are now 60-70 years old – nearing the end of their average life span. This makes increasing numbers of them more susceptible to various diseases, windthrow and natural competition. In addition, we are now experiencing, and will continue

to encounter an unprecedented number of new forest insects and diseases. Finally, over the past several decades, court decisions in the United States have steadily recognized an increasing responsibility of land management agencies to inspect for tree hazards in "urbanized" areas of parks and forests.

The recent training on tree management held in the park by Dr. Bill Sites of the U.S. Forest Service emphasized that we should pursue an eventual goal of having forest stands that are *uneven aged* and are as *high in tree species diversity* as possible in our developed areas. As we inspect for hazards in our facilities and along roadways, we may find a number of trees that will need to be removed in the near future. Dr. Sites has suggested that in the first year we remove any truly life-threatening trees and, if appropriate, defer work on developing problems to successive years. An important point to remember is that even the best tree hazard programs can not reduce tree failure to zero.

This plan has been several years in preparation and, according to the Forest Service, is one of the best they have seen. It should be viewed as a document which we will refine and build on in future years. If you have suggested improvements or additions to the plan, or need a "second opinion" on a tree problem encountered in your area, call the Natural Resource Office at X246.

/s/ Randall R. Pope
Randall R. Pope
Attachment

CC:
Assistant Superintendent
Administrative Officer
Chief, Maintenance
Chief, Ranger Activities
Chief, Visitor Services
Chief, Resources Management & Science
Natural Resource Specialist
Fire Management Officer
Safety Officer
North District Maintenance Office (2 copies)
South District Maintenance Office (2 copies)
Cades Cove Maintenance Office (2 copies)
North District Ranger Office
South District Ranger Office
Cosby Subdistrict
Little River Subdistrict
Cades Cove Subdistrict
Chilhowee Subdistrict
Lake Subdistrict
Oconaluftee Subdistrict
Cataloochee Subdistrict
Job Corps Center

APPENDIX E

EXCERPTS FROM GSMNP'S TREE HAZARD MANAGEMENT PLAN

C. Management Zones

* * *

The areas of the park in which the NPS will inspect and remove tree hazards are any "urbanized" areas of sustained visitor or employee use. In these areas, park visitors and employees are clearly invitees and will be reasonably protected by the NPS from hazards. All other areas either have dispersed use as natural or historic zones, or administrative responsibilities have been retained by licensees.
Specific areas within the park and the parkways administered by the NPS at this park and to be included in tree hazard abatement and prevention efforts will be found as listings of location codes in Appendix B.

VI. DESCRIPTION OF TREE HAZARD INSPECTION AND IDENTIFICATION PROCEDURE

A. Inspections

Regular inspection and identification of tree hazards is the shared responsibility of the local Maintenance and Ranger Activities supervisors. This responsibility may be delegated to other qualified Maintenance or Ranger Activities personnel as may become necessary. Inspections and identification of tree hazards will not be contracted for, nor will they be delegated to any person not employed by the National Park Service.

As has been discussed, tree hazard inspection and subsequent removal will take place in all areas of high visitor or employee use. Regular inspection of trees in areas of heavy visitor use within these zones will be accomplished on at least an annual basis. These areas include all campgrounds, visitor facilities, paved roads, parking lots, paved or heavily used interpretive trails, and "urbanized" sections of boundary (see Appendix B). The regular inspection area should include that area two times the average tree height in distance from areas of heavy visitor use. Areas of lighter visitor use, such as areas peripheral to those listed above, backcountry campsites, or lightly used trails, will be inspected at least every other year.

All regular inspections should be made on foot and must allow that any tree that could pose a hazard can be viewed from all sides, and that a thorough inspection of the crown can also be made. "Windshield" inspections, while very useful as informal extra inspections, cannot be substituted for the thorough annual inspection detailed above. Documentation of regular inspections is discussed in Section VII.

Trees which are judged by the inspector to require immediate removal should be either blazed or flagged, to facilitate their location by the persons doing the removal. Trees which are judged by the inspector to require limbing, topping, or other action short of complete removal should be temporarily marked with flagging, again, to facilitate their location.

In any case where disposition of a tree hazard is controversial and cannot be determined by the inspectors, a joint decision by division chiefs will determine the disposition of the tree.

Inspection of heavily used areas will also be made during and immediately after periods of heavy snow, high winds, ice storms, or heavy rain to check for development of new tree hazards and to close danger zones to the public. These inspections will be a shared responsibility between the Subdistrict Maintenance Foreman and the Subdistrict Ranger and may be delegated to qualified personnel from either division, as necessary. Good communication between involved personnel is essential to ensure that tree hazard identification and subsequent evacuation or site closure, if necessary, are expedited. These inspections and any subsequent communications between personnel should be documented in writing either in the ranger subdistrict office's format or in the maintenance log. Individual trees which may be identified through these inspections as hazardous should be documented as described in Section VII.

* * *

APPENDIX F

AN APPENDIX TO GSMNP'S

TREE HAZARD MANAGEMENT PLAN

LOGO

United States Department of Agriculture

Forest Service
Southeastern Forest Experiment Station

200 Weaver Boulevard
P.O. Box 2680
Asheville, NC 28802

Reply to: 3400
Date: November 9, 1988

Dr. Keith Langdon
National Park Service
Great Smoky Mountains National Park
Gatlinburg, TN 37738

Dear Keith:

I have reviewed the enclosed *Tree Hazard Management Plan* and am returning it with my comments written directly on the manuscript. Please forgive me for not putting them in this letter. I can get them to you quicker this way. I circled the page numbers on pages where I made a comment. Use what you wish.

The plan is the best, most thorough, and detailed one in existence in the East and perhaps the country. It covers every item extremely well and could well serve as a model for other parks. The authors are to be commended for a superior job. With your permission. I would like to

use it as an example to other parks. I will check with you each time the subject arises.

* * *

For "Pearls of Wisdom" (Appendix D). I have the following:

1. Black locust trees are short-lived and due to decay (following borer activity), break up and drop limbs and tops. Avoid them in new areas; remove them when possible in existing areas.

* * *

Dr. Keith Langdon

I've enjoyed working with Tim on this plan. Let me know if I can be of further service.

Sincerely,

/s/ Bill
WILLIAM H. SITES
Plant Pathologist

Enclosures

cc: Tim Stubbs

(2)

No. 93-667

Supreme Court, U.S.
FILED
APR 13 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

NELL D. AUTERY, ADMINISTRATRIX OF THE ESTATE OF ROY FRANKLIN AUTERY, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARK B. STERN
JENNIFER HAY ZACKS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

17 pp

QUESTION PRESENTED

Whether petitioners' tort claims against the government, which are based on the allegedly negligent implementation of a tree inspection policy for the Great Smoky Mountains National Park, are barred by the discretionary function exception in the Federal Tort Claims Act, 28 U.S.C. 2680(a).

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In the Supreme Court of the United States

OCTOBER TERM, 1993

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NELL D. AUTERY, ADMINISTRATRIX OF THE ESTATE OF ROY FRANKLIN AUTERY, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-21a) is reported at 992 F.2d 1523. The opinion of the district court (Pet. App. 22a-58a) is reported at 786 F. Supp. 944.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1993. A petition for rehearing was denied on July 28, 1993. Pet. App. 1a. The petition for a writ of certiorari was filed on October 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 5, 1989, Roy Autery and petitioner Charlotte Schreiner were driving on U.S. Highway 441 in the Great Smoky Mountains National Park when a black locust tree fell onto the road and struck their car. Autery, the driver, was killed; Schreiner, the passenger, was injured. The accident occurred in the North Carolina part of the Park, about two hundred yards from the Oconaluftee Visitors' Center. The tree fell because of root rot. Pet. App. 3a-4a, 27a-28a, 31a.

At the time of the accident, the Park had an unwritten policy for inspecting and removing potentially dangerous trees. The policy, as later embodied in writing, provided that the Park would "make every reasonable effort within the constraints of budget, manpower, and equipment available to detect, document, remove, and prevent tree hazards." Pet. App. 33a; see also *id.* at 31a-33a. Pursuant to the policy, park personnel initially inspected for tree hazards from the road, particularly in heavily trafficked areas of the Park. Trees that appeared potentially dangerous on initial inspection were more closely inspected for possible removal. *Id.* at 5a, 39a. Before the accident, park personnel had been told by a plant pathologist that certain types of trees, including black locusts, were subject to diseases that could cause their branches or tops to break off. *Id.* at 5a, 33a. The Park's policy did not, however, require the inspection or removal of any particular types or numbers of trees. *Id.* at 14a, 17a.

2. The administratrix of Roy Autery's estate, petitioner Nell Autery, and petitioner Schreiner filed separate suits against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2674 *et seq.*, in the United States District Court for the Southern

District of Alabama. Pet. App. 2a. The cases were consolidated and referred to a Magistrate Judge. *Id.* at 23a.

The government moved for summary judgment, arguing, among other things, that petitioners' claims are barred by the discretionary function exception of the FTCA, 28 U.S.C. 2680(a).[1] The Magistrate Judge recommended that summary judgment be denied. See Pet. App. 26a. In the Magistrate Judge's view, the discretionary function exception did not apply because "no element of choice was presented when the Defendant failed to remove black locust trees which were located within 'striking' distance of the roadway." *Id.* at 48a. In the alternative, the Magistrate Judge concluded that, even if

---

[1] The FTCA generally waives the sovereign immunity of the United States from claims

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b). That waiver is subject to certain exceptions. The exception relevant here, the discretionary function exception, provides (28 U.S.C. 2680(a)):

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

park personnel did have discretion as to the removal of the tree that struck Roy Autery's car, decisions regarding the removal of trees are not the type of discretionary decision that Congress intended to protect in enacting the discretionary function exception. *Id.* at 49a-50a. The district court adopted the Magistrate Judge's recommendation and reasoning. *Id.* at 27a.

After a bench trial, the court entered judgment in favor of petitioners. It held that park personnel "were negligent in not taking more positive, aggressive action to eliminate the [tree] hazard in areas such as the place where the accident occurred." Pet. App. 34a-35a. It awarded petitioner Autery $500,000 in compensatory damages; it awarded petitioner Schreiner $477.30 in actual expenses and $20,000 for emotional distress. *Id.* at 55a-58a.[2]

3. The court of appeals reversed and remanded with instructions to the district court to dismiss the action. Pet. App. 1a-21a. The court held that petitioners' claims are barred by the discretionary function exception of the FTCA.

The court applied "the two-part test for determining whether the government's conduct falls within the scope of the discretionary function exception" (Pet. App. 8a) articulated in *United States* v. *Gaubert*, 499 U.S. 315 (1991). Under that test, the court of appeals observed, it was required "first [to] determine whether the chal-

---

[2] The court limited petitioner Autery's award to $500,000, even though at trial she claimed damages in a greater amount, because she had sought only $500,000 in her administrative claim. Pet. App. 56a; see also 28 U.S.C. 2675(b) (limiting recovery to amount sought in administrative claim, in the absence of newly discovered evidence of additional damages not reasonably discoverable at time administrative claim is made).

lenged act or omission violated a mandatory regulation or policy that allowed no judgment or choice." Pet. App. 8a-9a. The court explained that the discretionary function exception would not bar a claim "if a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow, because the employee had no rightful option but to adhere to the directive." *Id.* at 9a, quoting *Gaubert*, 499 U.S. at 322 (internal quotation marks omitted). The court of appeals further observed that, even if the challenged conduct "involve[d] an element of judgment," the conduct was not protected by the discretionary function exception unless it was "grounded in the policy of the regulatory regime." Pet. App. 9a, quoting *Gaubert*, 499 U.S. at 322, 325.

The court then turned to the questions of whether the implementation of the Park's tree inspection policy was discretionary and, if so, whether it involved the type of discretion that the discretionary function exception was meant to protect. The court of appeals framed "the relevant inquiry" under the first part of this test as "whether controlling statutes, regulations and administrative policies mandated that the Park Service inspect for hazardous trees in a specific manner." Pet. App. 13a. The court answered that question in the negative, determining that "no mandatory statute, regulation or policy controlled the development and implementation of [the Park's] unwritten tree inspection plan." *Id.* at 18a. The court observed that the pertinent statute authorizes the Park Service, under authority of the Secretary of the Interior, to provide "in [its] discretion for the destruction . . . of . . . plant life as may be detrimental to the use of [the national] parks." *Id.* at 14a, quoting 16 U.S.C. 3. The court further observed that the pertinent agency directive was similarly "written in broad language"; although the directive "provided that the saving and safe-

guarding of human life takes precedence over all other park management activities" (Pet. App. 14a) (internal quotation marks omitted), it "d[id] not mention tree inspections, nor how the agency should implement the goal of safety or balance it against other considerations." *Ibid.* Finally, the court observed that the tree inspection policy for the Park "required only that employees 'make every effort within the constraints of budget, manpower, and equipment available to recognize and report' hazardous trees." *Ibid.* Thus, the policy "prescribed neither a particular method of inspection nor special rules for inspecting black locust trees." *Ibid.* Accordingly, the court held that the Park's failure to inspect and remove the tree that struck Roy Autery's car was a discretionary decision. See *id.* at 15a-16a.

The court of appeals next held that the decision whether to inspect and remove the tree involved the type of discretion that the discretionary function exception was intended to protect. Pet. App. 18a-21a. The court observed that in determining whether the challenged governmental conduct was grounded in policy considerations—and thus within the intended scope of the exception—courts are required under *Gaubert* to focus "not on the [government] agent's subjective intent * * * but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* at 20a, quoting *Gaubert*, 499 U.S. at 325. The court further noted that in other cases involving accidents in national parks, "courts have held that decisions about what safety measures to employ in national parks and how to execute them involve balancing the same considerations that inform all policy decisions regarding the management of national parks: safety, aesthetics, environmental impact, and available financial resources." *Id.* at 18a. The same was true here:

> To decide on a method of inspecting potentially hazardous trees, and in carrying out the plan, the Park Service likely had to determine and weigh the risk of harm from trees in various locations, the need for other safety programs, the extent to which the natural state of the forest should be preserved, and the limited financial and human resources available.

Id. at 21a.

ARGUMENT

Petitioners contend that the court of appeals erred in holding that their claims are barred by the discretionary function exception of the FTCA. The court of appeals correctly determined, however, that the question of whether petitioners' claims are barred by the discretionary function exception is governed by the two-part test this Court most recently enunciated in *Gaubert*. The court of appeals' application of the *Gaubert* test to the facts of this case is consistent with decisions of other courts of appeals on similar facts. Nor do petitioners identify any question of broad legal importance warranting this Court's attention.

1. "The determination of whether the discretionary function exception bars a suit against the Government is guided by several established principles." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). As this Court most recently explained in *Gaubert*, "[t]he exception covers only acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice.'" 499 U.S. at 322, quoting *Berkovitz*, 486 U.S. at 536. "Furthermore, even 'assuming the challenged conduct involves an element of judgment,' it remains to be decided 'whether that judgment is of the kind that the discretionary function exception was designed to shield.'" *Gaubert*, 499 U.S. at 322-323, quoting *Berkovitz*, 486

U.S. at 536. The court of appeals correctly determined that these well-settled principles govern the question of whether petitioners' claims are barred by the discretionary function exception. Pet. App. 10a-21a.

a. The court of appeals followed the proper course by considering, first, whether the government conduct on which petitioners' claims are based was discretionary. Pet. App. 10a-18a. The court correctly answered that question in the affirmative. *Id.* at 15a. As the court held, this is not a case in which "a 'federal statute, regulation, or policy specifically prescribe[d] a course of action for an employee to follow.'" *Gaubert*, 499 U.S. at 322, quoting *Berkovitz*, 486 U.S. at 536. The tree inspection policy for the Great Smoky Mountains National Park did not require the inspection or removal of any particular types or numbers of trees. Rather than prescribing specific and mandatory procedures, the policy broadly required park personnel to "make every effort within the constraints of budget, manpower, and equipment available to recognize and report" hazardous trees, focusing on those in the most-travelled parts of the Park. Pet. App. 14a. The policy thus gave park personnel considerable discretion in identifying and dealing with potentially hazardous trees.

Petitioners contend (Pet. 12), however, that park personnel had no choice but to inspect and remove the tree that struck Roy Autery's car. They assert that "[t]he sight of a black locust tree within striking distance of a heavily used roadway *required* a walk-around inspection." Pet. 12. If petitioners mean that a close-up inspection of every black locust tree close to the road was required under the terms of the tree inspection policy, they are wrong on the facts. As both lower courts found, the policy did not expressly impose such a requirement. Pet. App. 5a, 39a. If, on the other hand, petitioners mean

that the policy *should* have required park personnel to inspect at close proximity all black locust trees near the road, they are wrong on the law; their challenge to the substance of the policy invites "precisely th[e] sort of judicial intervention in policy-making that the discretionary function exception was designed to prevent." *United States* v. *Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820 (1984). Thus, however it is interpreted, petitioners' assertion does not establish that "a federal statute, regulation, or policy specifically prescribe[d] a course of action for an employee to follow" with respect to the conduct on which petitioners' claims are based. *Gaubert*, 499 U.S. at 322 (internal quotation marks omitted).

Petitioners rely on a supposed admission by park personnel that "if [a walk-around] inspection had been done in this case, the subject tree would have been removed." Pet. 12. Any such admission, however, does not help them; it suggests only that the discretion of park personnel would be limited *after* they had determined that a tree was hazardous and needed to be removed. Thus, if park personnel had determined that the tree that struck Roy Autery's car was hazardous and needed to be removed, they would have had a non-discretionary duty to exercise due care in removing it. Cf. *Berkovitz*, 486 U.S. at 538 n.3 (discussing *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955)). That situation would be comparable to a surgeon's duty to amputate a human limb after learning that it was hopelessly gangrenous. If that duty were breached, a malpractice claim would not be barred by the discretionary function exception.

This case involved decisionmaking at a different stage, namely, decisionmaking concerning whether to inspect a tree for possible hazards. The discretionary nature of such decisionmaking is clear from *Varig Airlines*.

There the Court held that the discretionary function exception barred claims based on the Federal Aviation Administration's allegedly negligent implementation of a "spot-check" system of inspecting aircraft. 467 U.S. at 814-820. The FAA's spot-check system, like the Park's tree inspection policy, gave federal officials broad discretion in selecting what to inspect. See *id.* at 817-820. The Court in *Varig Airlines* accordingly concluded that the selection of airplanes for safety inspections was discretionary. *Id.* at 801-803, 820-821. The court of appeals here therefore correctly concluded that the selection of trees for safety inspections was likewise discretionary.[3]

Finally, petitioners challenge (Pet. 12) the court of appeals' determination (Pet. App. 17a) that "there was no evidence presented" that park personnel violated the Park's tree inspection policy. That fact-bound challenge is without merit. Petitioners assert that "the evidence established that park employees had been in the immediate vicinity of the subject tree and still failed to detect it even though it had visible external signs of decay." Pet. 13. The portion of the record that petitioners cite for that assertion, however, does not support it.[4] In any event, even if there were evidence

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[3] Here, as in *Varig Airlines*, the function was discretionary even if the federal officials abused their discretion when they failed to discover the danger that led to the injuries complained of. As the court of appeals observed, "[t]he FTCA expressly provides that the exception 'applies to policy judgments, even to those constituting abuse of discretion.'" Pet. App. 13a, quoting *Dickerson, Inc.* v. *United States*, 875 F.2d 1577, 1581 (11th Cir. 1989).

[4] In the portion of the record on which petitioners rely, petitioners' counsel asked a witness whether "there were other stumps of trees where somebody had already been up in this area cutting down trees." The witness's answer was equivocal: "Yes, probably. I don't know." 3 R. 205. Moreover, there was no evidence con-

that park personnel had recently removed trees in the vicinity of the tree that struck Roy Autery's car, that evidence would not establish a violation of the tree inspection policy, since the policy did not require park personnel to inspect all trees in the vicinity of trees that were being removed.

b. With regard to the second part of the *Gaubert* test, the court of appeals held that the Park's implementation of its tree inspection policy involved the type of discretion that the discretionary function was meant to protect. Pet. App. 18a-21a. The Park's policy was based on an agency directive that stressed the "saving and safeguarding of human life * * * over all other park management activities." *Id.* at 14a. The court of appeals determined that the concern for safety expressed in the policy was explicitly qualified by "the constraints of budget, manpower, and equipment available." *Ibid.* The court of appeals also determined that it was likely that, in developing the tree inspection policy, the Park considered factors other than safety from tree hazards, such as "the need for other safety programs [and] the extent to which the natural state of the forest should be preserved." *Id.* at 21a. Based on those determinations, the court of appeals concluded that the implementation of the Park's policy was "based on considerations of public policy." *Gaubert*, 499 U.S. at 323 (internal quotation marks omitted).

Petitioners contend that an agency's "failure to act" can never involve a decision based on policy. Pet. 15. That broad contention is plainly wrong. Petitioners'

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cerning when or why the other trees had been removed. No violation of park policy is established by the bare fact that at some time in the past and for some reason, park personnel had removed trees in the vicinity of the tree that later struck Roy Autery's car.

contention cannot be reconciled with the text of the discretionary function exception, which expressly applies, not only to the "exercise or performance" of a discretionary function, but also to "the failure to exercise or perform" such a function. 28 U.S.C. 2680(a). Nor can petitioners' contention be reconciled with decisions in which this Court has applied the exception to bar claims based on an agency's failure to act. See *Varig Airlines*, 467 U.S. at 814-816; see also *Dalehite* v. *United States*, 346 U.S. 15, 23-24, 37-38, 42-44 (1953) (discretionary function exception barred claims based on government's allegedly negligent failure to determine explosive qualities of fertilizer and failure adequately to supervise loading of fertilizer).

Petitioners next argue that the government was required to prove that "while the park personnel were driving along the park's roadways * * * they were balancing economic, social, or political concerns." Pet. 17 (internal quotation marks omitted). In *Gaubert*, however, this Court stated that "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." 499 U.S. at 325. Petitioners do not explain how their argument can be squared with *Gaubert*.

2. There is no conflict among the circuits on the question presented here. As the court of appeals observed, other courts of appeals have held that the discretionary function exception bars claims based on alleged negligence in the implementation of safety measures in national parks. Pet. App. 18a; see also, *e.g.*, *Kiehn* v. *United States*, 984 F.2d 1100, 1103-1108 (10th Cir. 1993) (discretionary function exception barred claims based on allegedly negligent failure to warn hikers of unstable

rock formation and allegedly negligent rescue); *Johnson* v. *United States Dep't of Interior*, 949 F.2d 332, 336-340 (10th Cir. 1991) (same); *Zumwalt* v. *United States*, 928 F.2d 951 (10th Cir. 1991) (failure to warn). The decisions cited by petitioners in which the exception has been found inapplicable all involved violations of non-discretionary duties specifically mandated by regulation or agency guidelines. Pet. App. 13 n.6 (citing cases). Those decisions are inapposite in this case, which involved a policy that did not specifically prescribe the course of action park personnel were required to take with respect to the tree that struck Roy Autery's car.

For the same reason, the Eleventh Circuit decision on which petitioner relies, *Phillips* v. *United States*, 956 F.2d 1071 (1992), is inapposite. In *Phillips*, the Eleventh Circuit held that the discretionary function exception did not bar claims based on violations of an accident prevention plan and safety manual by employees of the Army Corps of Engineers. *Id.* at 1076-1077. As the Eleventh Circuit explained in the present case, its decision in *Phillips* rested on a determination that the particular policy at issue established mandatory duties that government employees breached. Pet. App. 16a-17a. Thus, *Phillips* reflects the principle that "[i]f the employee violates the mandatory [agency regulation or guideline], there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." *Gaubert*, 499 U.S. at 324. That principle is not implicated here, because, as the Eleventh Circuit correctly held, park personnel did not violate any duties specifically prescribed by statute, regulation or agency guideline. In any event, any conflict between *Phillips* and the decision below is for the Eleventh Circuit to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1993

NELL D. AUTERY, as Administratrix of the Estate of ROY FRANKLIN AUTERY, deceased, and CHARLOTTE SCHREINER,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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REBUTTAL STATEMENT OF FACTS

Petitioners wish to convey two points. First, petitioners have attached photographs (in the appendix to this reply) which depict the proximity of the tree-line to the roadway where the subject accident occurred. These photographs give perspective to the evidence which established that the subject tree was located only forty-five (45) feet from the roadway when it fell. The close proximity of the tree takes on greater significance when considered in light of the evidence that this tree had half its bark missing for perhaps as long as *twenty years* prior to this accident.[1] Despite the THMP's requirement for annual, on-foot, walk-around inspections of *all* trees within a distance of "twice the average tree height" (Pet. App. E at 62a-64a), this tree went undetected for many years.

Second, the government contends (Br. at 8) that petitioners are "wrong on the facts" in asserting that the THMP required a walk-around inspection at the sight of a black locust tree within striking distance of a heavily used roadway. This is simply not the case. The THMP required on-foot, walk-around inspections in the area two

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[1] The district court noted that plaintiffs' tree expert, Tim Johnson, testified that "the portions of the tree he examined after the accident had a large exterior portion of decay." R2-64-17. Mr. Johnson testified that *half its bark was missing*. R3-150-51. The government's expert, Dr. William Sites, ascribed the damage to "1) fire or 2) another tree falling against them, or 3) by limbs being broken off during storms, ice or snow; or perhaps a combination of these." Plaintiffs' Exhibit n-10; R3-38. Plaintiffs' expert opined that these injuries occurred *twenty years earlier*. R4-144. Both Dr. Sites and Mr. Johnson testified that the tree's decay evidenced itself on the tree's exterior and was visible upon inspection. R2-64-17; R3-148-50.

times the average tree height from areas of heavy visitor use. This tree was seventy feet tall. Assuming it was of average height (the photographs bear this out), then the THMP required inspections one hundred forty feet from the shoulder. Conversely, since this tree was forty-five feet from the highway, the average tree height would have had to have been less than twenty-two and one-half feet for *this* black locust to fall outside the mandatory annual inspection area. The photographs equally *disprove* this contention.

The Park Services' safety and concessions manager, Clarence Rice, acknowledged that the Park Service performed annual inspections in the areas of heavy visitor use. Plaintiffs' Exhibit H at pp. 35-6; R3-38. In fact, the Park Service removed approximately nine hundred hazardous trees per year from the areas of the heavy visitor use, R3-117-121, and other trees were cut in the immediate vicinity of this subject tree. R3-205; plaintiffs' Exhibit I at pp. 11 and 43.

ARGUMENT

I.

The petition for a writ of certiorari was docketed on October 26, 1993. The government received *five* extensions of time for submission of its reply (two ostensibly because of ongoing settlement negotiations). Despite six months with which to formulate its response, the government's brief fails to address the fundamental issue presented: Whether the Park Service's THMP was sufficiently specific and mandatory to deprive its employees of discretion to not inspect for hazardous trees adjacent to the Park's most heavily travelled highway.

Nowhere does the government tackle how the Park's employees could have any discretion *to not act* when the THMP specified *who* was to inspect, *what* was to be inspected, *when* the inspections were to occur, *where* the inspections were to take place, and *how* they were to be done.

The government simply condemns as "inapposite" the cases petitioners cited from other circuits (Pet. at p. 13, n. 6) which found no discretion where regulations and policies far less stringent than those here were involved. Br. at 13. Actually, those cases go to the heart of the issue.

By requiring that the THMP "compel park employees to inspect certain trees on certain days or remove a particular number of trees per week", App. B at 17A, the Eleventh Circuit requires far more specificity and a greater mandate for day-to-day conduct in governmental regulation or policy than the Eighth[2], Ninth[3] or

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[2] *Appley Bros. v. United States*, 7 F.3d 720 (8th Cir. 1993), *see*, discussion, n. 9, *infra*; *see*, also *McMichael v. United States*, 856 F.2d 1026 (8th Cir. 1988) (Government inspector's safety checklist required inspector to shut down munitions plant in event of an electrical storm; Government not immunized by discretionary function exception for failing to order evacuation when electrical storm occurred); *Aslakson v. United States*, 790 F.2d 688 (8th Cir. 1986) (Agency's failure to elevate power lines not protected by discretionary function immunity when agency's own safety policy expressly required it to "raise its power lines if they constitute[d] a safety hazard").

[3] *Routh v. United States*, 941 F.2d 853 (9th Cir. 1991) (No immunity for contracting officer required to report absence of fall protection to contractor and give notice that corrective action needed under Federal Acquisition Regulations incorporated within construction contract.

Tenth[4] Circuits require. By immunizing conduct which is at best "judgment guided purely by scientific or other objective principles", the Eleventh Circuit ignores the lesson of *Berkovitz* and is at odds with at least the Third[5], Ninth[6], and Tenth Circuits.[7] By requiring no evidence

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[4] *Kiehn v. United States*, 984 F.2d 1100, 1106 (10th Cir. 1993) (No discretion to not undertake emergency rescue when prescribed by Concession Permit's Operation Plan and Emergency Medical Services Guidelines); *Tinkler v. United States*, 982 F.2d 1456 (10th Cir. 1992) (No discretionary function immunity when Air Traffic Control Specialist fails to abide by Flight Service Manual's requirement to timely provide private pilot with accurate weather information).

[5] *Fisher Bros. Sales, Inc. v. United States*, No.s 93-1182, 1205-09 (3d Cir. Feb. 25, 1994), *see*, discussion *infra* at p. 8; *see*, also, *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974) ("Where the conduct of the government employees in implementing agency regulations requires only performance of scientific evaluation and not the formulation of policy, we do not believe that the conduct is immunized from judicial review as a 'discretionary function.' ")

[6] *Summers v. U.S.*, 905 F.2d 1212, 1215 (9th Cir. 1990) ("a governmental failure to warn is not necessarily shielded from suit simply because a discretionary function is in some way involved. On the contrary, we have concluded that 'where the challenged governmental activity involves' safety considerations under an established policy rather than the balancing of competing policy considerations, the rationale for the 'exception falls away and the U.S. will be responsible for the negligence of its employees.' "); *ARA Leisure Services v. U.S.*, 831 F.2d 193, 195 (9th Cir. 1987) (same – Park Service's failure to maintain roadway does not involve "balancing of competing policy considerations.").

[7] *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992) ("We fail to see how the determination in this case can be labeled a policy decision. The choice was governed, as plaintiffs contend, by 'objective principles' of electrical engineering").

whatsoever that a government employee's *failure to act was indeed policy-based,* the Eleventh Circuit is in direct conflict with the standard required by the Sixth Circuit.[8]

Petitioners do not seek a *bright line test* for what is or is not sufficiently specific or mandatory to deprive governmental actors of discretion. Given the myriad situations in which government employees act, this would be impossible. However, the other circuits' opinions provide a relative range of *Gaubert's* limits, beyond which the Eleventh Circuit travelled in the instant case. By merely dismissing these cases as "inapposite", the government avoids confronting the very essence of this controversy. By failing to substantively analyze how or why the circuits are split, the government implicitly concedes that *Autery* is indefensible.

II.

Since release of the Eleventh Circuit's opinion below, it has been cited six times – twice in cases with substantively similar governmental policy mandates concerning inspection and testing but with the opposite results[9]; once

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[8] *Myers v. United States,* No.s 92-5812, 5813, 5814, 5816 (6th Cir., March 1, 1994) (*see,* discussion *infra* at p. 9).

[9] In *Appley Bros. v. U.S.,* 7 F.3d 720, 725 (8th Cir. 1993), a failure by U.S.D.A. grain inspectors to abide by mandatory requirements in checking for and reporting warehouse shortages was *not* immunized under the FTCA. The Eighth Circuit found no discretion to not act. However, the court interpreted *Autery* to mean a *"general guideline* [is] insufficient to deprive the federal government of the protection of the discretionary function exception".

See, also, *Barton v. American Red Cross,* 829 F.Supp. 1290, 1312-13 (M.D.Ala. 1993), which extends *Autery* to the realm of

as drawing "an important distinction between those acts of government actors that embody public policy and those that are merely everyday decisions void of any public policy implications."[10]; and in three other cases.[11]

Because the Eleventh Circuit's opinion in *Autery* cannot be reconciled with the other circuits' opinions, and is now being erroneously followed, it is clear the government is wrong in asserting (Br. at p. 7) that *Autery* "is consistent with decisions of other courts of appeals on similar facts." In fact, since this petition was filed, two more recent federal courts of appeals' opinions have been

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official federal employee immunity and cautions courts "not to forge a fact-based inquiry into the circumstances surrounding the government actor's exercise of a particular discretionary function, but [to] instead look to the nature of the challenged decision in an objective, or general sense and ask whether that decision is one which a reasonable person would expect inherently to be grounded in considerations of policy." The court found no discretion in the Red Cross Director's performance of HIV test on donors' blood "although the performance of the test may involve some judgment, that judgment is not grounded in setting the Red Cross's regulatory policy."

[10] *See, Redland Soccer Club v. Dept. of Army*, 835 F.Supp. 803, 806-7 (M.D.Pa. 1993).

[11] *See, Powers v. U.S.*, 996 F.2d 1121, 1124-5 (11th Cir. 1993) (finding Congress' use of the word "*shall*" in 42 U.S.C.A. § 4020 afforded the Director of FEMA "discretion to decide when and how best to make information and data available to the public regarding federally subsidized flood insurance."); *Bowan v. United States*, Ms. 90-1123-Civ-J-20 (M.D. Fla., March 30, 1994) ("The relevant inquiry is whether the controlling statute or regulation mandates that a government agent perform his or her function in a specific manner."); *Mesa v. United States*, 837 F.Supp. 1210 (S.D.Fla. 1993).

released which appear to be in direct conflict on the discretionary function immunity issue. In both these cases the courts of appeals found no discretion to not inspect or test because such conduct is not "based in policy".

For example, in *Fisher Bros. Sales, Inc. v. United States*, Case No.s 93-1205, -1206, -1207, -1208, -1209 (3d Cir. Feb. 25, 1994), growers and exporters of Chilean fruit and domestic importers brought an action under the FTCA alleging that Chilean grapes were negligently tested by an FDA laboratory, that the tests falsely showed the presence of cyanide, and that they were damaged by the resulting removal of all Chilean fruit from the market. In rejecting the government's discretionary function immunity defense, the Third Circuit stated:

> "Even were we to find that the lab technicians had discretion as to the manner in which they tested the grapes, it is apparent that it was not the sort of discretion Congress meant to protect . . . Judgment guided purely by scientific or other objective principles does not involve discretion for purposes of the discretionary function exception."

Id. at p. 6. In the instant case, the only "choice" the Park Service's employees were to make was whether a tree was located within a specified height/distance from an area of heavy sustained visitor use. At best this was a choice to be made using scientific or objective principles. Once made, the employees were required by the THMP to do on-foot walkaround inspections of the trees at least annually. According to the Third Circuit in *Fisher Bros.*, these sorts of "judgments" do not involve discretion "for purposes of the discretionary function exception."

In another failure to inspect case, *Myers v. United States*, No.s 92-5812, -5813, -5814, -5816 (6th Cir. March 1, 1994), survivors of miners killed in an explosion brought an FTCA action against inspectors from the Mine Safety & Health Administration. Finding no discretionary function immunity, the Sixth Circuit stated:

> "Plaintiffs contend that the MSHA inspectors should have found, but failed to find, the existence of certain safety violations and, if they had, the deaths of these miners would have been prevented. As the court in *Berkovitz* held, the applicability of the discretionary function exception in such situations turns on whether the MSHA inspector is authorized to make such assessments as a matter of public policy, or whether those determinations are supposed to be the product of more objective criteria. We hold that neither the Act nor the MSHA regulations authorize mine safety inspectors to conduct their inspections on the basis of 'social, economic or political policy.' "
>
> * * *
>
> "[T]he choices inherent in these assessments are to be made by MSHA inspectors in light of their own observations, informed by professional judgment and knowledge of the industry. Considerations of 'political, social or economic policy' are not authorized to play a part in these assessments."

Id. at pp. 7-8. By analogy, the Park Service's employees were charged only with determining whether "hazardous" trees were within a specified height/distance from a high visitor use area. These decisions were not grounded in policy any more than the MSHA mine inspectors' decisions were. The Park Service's maintenance personnel were not to balance "political, social or economic

concerns" while inspecting for trees; rather, they were to make the objective determination of whether a tree fell within some proximity to a heavy visitor use area. Upon such a finding, the Park Service's policy required at least annual on-foot, "walk-around" inspections of those trees. It remains undisputed that had that been done, this tree would have been eliminated.

The Eleventh Circuit found that the Park Service's failure to make the required tree inspections *was susceptible* to policy analysis because "the Park Service *likely* had to determine and weigh the risk of harm from trees in various locations, the need for other safety programs, the extent to which the natural state of the forest should be preserved, and the limited financial and human resources available." Pet. App. 21a. However, as noted (Pet. at 15-7), the government presented absolutely no evidence at trial from which the Eleventh Circuit might have drawn this speculative conclusion. Instead, the court held that immunity exists, in a failure-to-act case, even without any proof that the failure to act was indeed grounded in policy. According to *Berkovitz* and the circuit courts of appeals' opinions cited herein, these types of failures to act are not policy-based in any event.

CONCLUSION

Petitioners have shown the clear splits in authority among the circuits. The sheer volume of judicial resources spent analyzing discretionary function issues begs for further clarification. A Westlaw query reveals that, in the three years since this Court decided *Gaubert*, the lower federal courts have released 133 discretionary function opinions. Because *Autery* has now essentially

undermined the FTCA in the Eleventh Circuit, this Petition should be granted.

Respectfully submitted,

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APPENDIX G

[PLAINTIFFS' EX. A-1; R3-38]